Supreme Court, U.S.
FILED

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No.

In the

Supreme Court of the United States

October Term, 1998

OLGA H. GARAU,

Petitioner,

v.

JAMES K. HAHN, THOMAS C. HOKINSON and CITY OF LOS ANGELES,

Respondents.

On Petition for A Writ of Certiorari
to the Supreme Court of California

PETITION FOR A WRIT OF CERTIORARI to the Supreme Court of California

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QUESTION PRESENTED

Does California's absolute discretionary immunity statute, as applied by that State's courts to bar causes of action against individual public officials for unlawful employment practices such as gender and national origin discrimination, retaliation, wrongful termination, and in this instance violations of whistleblower protections and even of constitutionally-protected free speech—among other civil rights—violate tenured public employees' equal protection guarantees under Section 1 of the Fourteenth Amendment of the United States Constitution?

PARTIES TO THE PROCEEDING

The following party was the Plaintiff, Appellant, and Petitioner below, and is the Petitioner before this Court:

OLGA HERNÁNDEZ GARAU

The following parties were the Defendants and Respondents below, and with the exception of the City of Los Angeles, are the Respondents before this Court:

JAMES K. HAHN
THOMAS C. HOKINSON
CITY OF LOS ANGELES

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Respondents.

PETITION FOR WRIT OF CERTIORARI

Petitioner, OLGA HERNÁNDEZ GARAU, respectfully prays that a Writ of Certiorari be issued to the Supreme Court of California to review the unpublished opinion of the California Court of Appeal that became a final judgment on October 15, 1998, upon issuance of the remittitur in this proceeding as to Respondents JAMES K. HAHN ("Hahn") and THOMAS C. HOKINSON ("Hokinson"), following denial of review by the California Supreme Court on September 23, 1998.

OPINIONS AND ORDERS BELOW

The opinion and orders below sought to be reviewed in this proceeding are all unpublished, and are reprinted at the following page numbers in the Appendix ("A") to this Petition:

The September 23, 1998 Order of the California Supreme Court denying review on appeal is reprinted at A:1.

The July 29, 1998 Order of the California Court of Appeals denying rehearing is reprinted at A:2.

The June 29, 1998 Opinion of the California Court of Appeal is reprinted at A:3-23.

The September 24, 1997 Order of the California Supreme Court denying review on writ is reprinted at A:24.

The August 5, 1997 Order of the California Court of Appeal denying petition for writ of mandate is reprinted at A:25.

The August 7, 1997 Order of Dismissal on demurrer from the Superior Court of California for the County of Los Angeles us reprinted at A:26-27.

JURISDICTION

Per Order dated September 23, 1998 from which certiorari is sought, the California Supreme Court summarily denied review of the California Court of Appeal opinion affirming the Order of Dismissal of Hahn and Hokinson by the Superior Court of California for the County of Los Angeles in this matter.

Jurisdiction of this Court to review this case on certiorari rests on 28 U.S.C. §1257(a), from a final judgment of a state's highest court in which the constitutionality of a state statute is drawn into question.

Pursuant to Rule 29.4(c) of this Court, NOTICE IS HEREBY GIVEN TO THE ATTORNEY GENERAL OF THE STATE OF CALIFORNIA, that 28 U.S.C. §2403(b) may therefore apply, and that neither the State of California, nor any agency, officer, or employee thereof has heretofore been a party to this proceeding.

FEDERAL CONSTITUTIONAL PROVISION AND STATE STATUTE INVOLVED

Equal Protection Clause of the Fourteenth Amendment to the United States Constitution:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."
> United States Constitution, XIV Amendment, § 1.

And Section 820.2 of the California Government Code:

> "*Except as otherwise provided by statute*, a public employee is not liable for an injury resulting from his act or omission where the act or omission was the result of the exercise of the discretion vested in him, *whether or not such discretion be abused" California Government Code* Section 820.2 (emphasis added).

STATEMENT OF THE CASE

A. Introduction

Under California's discretionary immunity statute, *Government Code* Section 820.2, set forth in full above, public employees enjoy absolute immunity for discretionary acts, even if the official is not acting in good faith.

This absolute immunity has been applied by the California Supreme Court in *Caldwell v. Montoya*, (1995) 10 Cal. 4th 972, 42 Cal. Rptr.2d 842, 897 P.2d 1320 to bar claims of reverse discrimination, breach of contract, and retaliatory discharge in violation of fundamental public policy against public school board members who voted to terminate the contract of an *at-will* school superintendent The case did not involve violations of federal statutes, nor state statutes other than California's *Fair Employment and Housing Act ("FEHA")*, [1] nor violations of constitutional magnitude as alleged by Petitioner in this proceeding, nor a constitutionally-protected property right to a public job, since that superintendent, unlike Petitioner, was not tenured.

Yet no immunity attaches to violations of the *California Government Code* whistleblower statute. [2] *See Southern Cal. Rapid Transit Dist. v. Superior Court* (1994) 30 Cal. App. 4th 713, 36 Cal. Rptr. 2d 665, acknowledged and distinguished by the California Supreme Court in *Caldwell, supra*, 10 Cal.4th, at 987, n. 7, in which the same Division of the California Court of Appeal out of which the instant case arises, refused to immunize an individual supervisor from liability for the state common law tort of wrongful termination in violation of the public policy expressed in the

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[1] *California Government Code* Sections 12900, *et seq.*

[2] Currently at *California Government Code* Sections 53296, *et seq.*

First Amendment and the whistleblower statute, although holding him not liable for lack of a sufficient liberty interest, where no property interest existed because, unlike Petitioner, plaintiffs in the *SCRTD* case were at-will employees. Remarkably, the opinion does not address this aspect of its prior decision, even though Petitioner cited it as favorable precedent in her briefs.

Instead, the Court of Appeal alluded at A:21-22 of the appended opinion to *Shoemaker v. Meyers II* (1992) 2 Cal.App.4th 1407, 1423-1425, 4 Cal.Rptr.2d 203. But the whistleblower statutes involved in both *SCRTD* and *Shoemaker* did not "expressly provide" that *Government Code* Section 820.2 immunity did not apply to it, as required by the California Supreme Court allowing the immunity as to *FEHA* in *Caldwell*, *supra*, 10 Cal.4th, at 986. Notably, *FEHA* is also a whistleblower statute of sorts, as is evident from the retaliation clause of *Government Code* Section 12940(f), which applies to any "person," not just "employers." [3] The rationale for the exception as to whistleblower statutes was grounded on the strong public policy favoring disclosure of public wrongdoing, which *FEHA* and the other civil rights statutes involved in this case would also accomplish were the State to permit their enforcement.

The issue is not believed to have ever been passed upon by this Court and is of tremendous import so as to warrant review, not just because constitutional rights of public employees are being trampled upon, but more importantly because the legal, ethical, and moral obligations of a certain class of lawyers, those in public sector supervision, are rendered meaningless by the state courts' rulings below.

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[3] I*See California Government Code* Section 12925(d) defining the word "person" for purposes of this section.

B. Facts Material to the Question Presented

STATEMENT OF FACTS

Respondents Hahn and Hokinson were the only individual supervisors named in the underlying lawsuit. Hahn is and remains the elected City Attorney for the City of Los Angeles. Hokinson, promoted to his post by Hahn, was, although he has since been reassigned, the Chief Assistant City Attorney for the Department of Water and Power where Plaintiff worked for the last seven years prior to her termination.

Petitioner is a practicing attorney, and a member in good standing of the Bar of this Court, the States of California and Florida, and the District of Columbia. She is also a naturalized United States citizen who emigrated to this country from her country of origin, Cuba. After graduating from the University of California at Los Angeles and obtaining her law degree from the University of Southern California, she joined the Los Angeles City Attorney's Office where she was employed as a Deputy City Attorney for almost eleven years.

But her employment was constructively terminated as soon as she filed, in April of 1997, the lawsuit underlying this Petition, six months after filing an *amicus* brief with this Court in October of 1996 on behalf of her client, the Department of Water and Power of the City of Los Angeles in *Auer v. Robbins* (1997) ___U.S.___, 137 L.Ed.2d 79, 117 S.Ct. 905, and immediately thereafter complaining to City Attorney Hahn about unlawful discrimination, harassment, and retaliation largely unrelated to that case.

Two weeks after that written complaint of discrimination and disparate treatment, which was never investigated or taken seriously by anyone in the City Attorney's Office, as required by law and the City's own policies and procedures, a retaliatory disciplinary action began, threatening termination of her employment because of Petitioner's insistence on protecting her client's interests in multi-million-dollar cases Fair Labor Standards Act cases she was handling before the Ninth Circuit, related to *Auer, supra.*

Petitioner's threatened termination became imminent shortly after she filed her government claim with the City of Los Angeles and formal administrative charges of discrimination, retaliation, and harassment with the State Department of Fair Employment and Housing in early 1997. New disciplinary charges, based upon the exact same facts, were added at the behest of Hokinson and Hahn to the formal termination of employment packet with which Petitioner was presented on March 21, 1997, less than 45 days after she filed her formal government claim under the *California Torts Claim Act* [4] and her administrative charge under *California's Fair Employment and Housing Act, supra* on February 6, 1997.

Precluded by her supervisors from giving her client an ethical disclosure concerning her lawsuit against the City, the City Attorney, and the highest ranking lawyer for its key revenue-generating department, which was essential for the client to know given Petitioner's sensitive position as a personnel lawyer, Petitioner was forced to quit her tenured public job and go into private practice.

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[4] *California Government Code* Sections 810, *et seq.*

PROCEDURAL HISTORY

Petitioner's case is a civil rights action seeking to vindicate unlawful employment practices involving constitutional violations of free speech, equal protection, substantive and procedural due process, discrimination, and the right to petition the government; gender and national origin discrimination, retaliation, harassment, hostile work environment, and constructive wrongful discharge in violation of California's *Fair Employment and Housing Act ("FEHA")* and fundamental public policy; violations of the California's *Labor Code* whistleblower and other civil rights statutes including the *Bane* [5] *Act* and the *Ralph Act,* [6] tort causes of action for abuse of official authority, *negligence per se*, and intentional and negligent infliction of emotional distress.

Respondents' demurrers to the operative First Amended Complaint were sustained in their entirety as to all three defendants, including the individual Respondents Hokinson and Hahn on grounds of discretionary immunity pursuant to *California Government Code* Section 820.2.

A Petition for Writ of Mandate followed on this issue as to the individuals, which was summarily denied by the Court of Appeal on August 5, 1997. And the California Supreme Court denied review of this denial on September 24, 1997.

An appeal then followed from the trial court's order of dismissal of the two individual Respondents on grounds of absolute discretionary immunity, which the Court of Appeal

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[5] *California Civil Code* Section 52.1.

[6] *California Civil Code* Section 51.7.

decided adversely to Petitioner, affirming the trial court's order in all respects, per opinion filed June 29, 1998.

A timely Petition for Rehearing followed, urging the Court of Appeal to distinguish *Caldwell* factually, as reiterated at oral argument, and to reconsider the appellate court's mischaracterization of Petitioner's discretionary immunity arguments, particularly evident at A:20 of the opinion, which erroneously states that Petitioner made the same argument that was rejected in *Caldwell.*

Petitioner's briefs raised, rather, the mandatory duty and equal protection arguments that could not be made in *Caldwell* because they did not apply, since the public employee discriminated, wrongfully terminated, and retaliated against in that case did not have a constitutionally-protected right to his job because unlike Petitioner he was not a tenured public employee, but rather a top school official whose contract had expired.

The Petition for Rehearing urged the Court of Appeal to address these pivotal legal issues, or, at a minimum, to grant Petitioner leave to amend a 42 *U.S.C.* §1983 [7] civil rights cause of action against the individuals defendants, as to which state immunities are no bar. Rehearing was summarily denied on July 29, 1998.

The subsequent, timely Petition for Review to the California Supreme Court was similarly denied in summary fashion on September 23, 1998, from which this Petition for Certiorari follows.

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[7] Based on *Caldwell v. Montoya, supra*, 10 Cal.4th, at 989, n. 9, and *Williams v. Horvath* (1976) 129 Cal.Rptr. 453, 16 Cal.3d 834, 548 P.2d 1125.

C. How The Federal Question Was Raised But Ignored at All Stages of the Proceeding

IN THE COURT OF FIRST INSTANCE

The equal protection challenge to Section 820.2 of the *California Government Code* was first raised orally at the hearing on demurrer, at Page 107, Line 26 to Page 108, Line 14 of the record before the Court of Appeal in this case, in which the unavailability of punitive damages to public employees was specifically brought to the trial court's attention. Yet, the dismissal order failed to address the issue.

IN THE COURT OF APPEAL

1. First by Writ Petition

The issue was then squarely presented on the briefs seeking a writ of mandate, which the California Court of Appeal refused to grant and the denial of which the California Supreme Court refused to review, both without opinion or explanation.

2. Subsequently on Appeal

Petitioner's Opening Brief, at page 4, again specifically grounded its equal protection attack on Section 820.2 of the *California Government Code* upon the equal protection clause of both the State and Federal Constitutions. Respondents' brief did not address the issue, other than to concede, at page 32-34, that in *Bradley v. Medical Board of California* (1997) 56 Cal. App. 4th 455, 65 Cal.Rptr.2d 483, a California appellate court had applied the federal qualified immunity doctrine to a *federal* due process claim by a

government employee who had been the victim of an unreasonable undercover investigation.

The Court of Appeal echoed Respondents' brief by applying the federal doctrine of qualified immunity—which is *not* the law of California as to state causes of action—to *some* of the facts of this case in such a way as to affirm the trial's court order of dismissal in its entirety. However, as pointed out at Page 18 of Petitioner's Reply Brief, this case comes to the bench *on demurrer*, where the factual merits are irrelevant, and the only questions presented are ones of law, which all courts below have refused to address.

At oral argument before the California Court of Appeal, in response to a question by Justice Kitching, Petitioner alluded to established state precedent for the proposition that state sovereign immunity statutes cannot bar federal civil rights actions such as 42 *U.S.C.* §1983 because of the Supremacy Clause at Article VI, §2 of the United States Constitution, and asked that court for leave to amend to assert such claims were the state immunities held to bar her action. *Accord, Howlett v. Rose* (1990) 496 U.S. 356, 110 L.Ed.2d 332, 110 S.Ct. 2430. However, leave was not mentioned in the opinion, even though, at A:14-15 the appellate court acknowledges that,

> "if there is a reasonable possibility that the defect in a complaint can be cured by amendment, it is an abuse of discretion to sustain a demurrer without leave to amend [Citation.] The burden is on the plaintiff, however, to demonstrate the manner in which the complaint might be amended" to state a cause of action (*Ibid.)* Such a demonstration may be made to the appellate court in the first instance." A:14-15.

Additional facts elicited in discovery against the City of Los Angeles after the demurrer was sustained and that have developed since this lawsuit was filed, can be pleaded to buttress existing federal civil rights violations.

Briefing on the merits of Respondents' liability as to Petitioner's claims, which including only state statutory and constitutional violations, will be provided on the appeal to follow from the grant of summary judgment as to the City. These issues were not briefed in the appeal of the dismissal of the individual Respondents on demurrer because, as pointed out at Page 18 of the record before the appellate court, it involves immunity, not liability.

3. And Again on Rehearing

As set forth in the Procedural History section of this Petition, Petitioner expressly called to the Court of Appeal's attention at pages 3-4 of her Petition for Rehearing, its failure to address her key legal arguments, namely how *Caldwell* was distinguishable from her case, and particular her equal protection challenge, which was premised upon both the state and federal Constitutions, and both of which the court had failed to address in its opinion.

IN THE STATE SUPREME COURT

The second time this case came before the California Supreme Court on Petition for Review, Petitioner again sought clarification, expressly at Page 7, from the very court that decided it, of the full extent of its ruling in *Caldwell v. Montoya*, and whether its *narrow* holding in that case applied to the very different facts of this case; and if it did, Petitioner pointedly asked at Page 13 whether the rulings below, and Sections 820.2 and 815.2(b) of the *California Government*

Code in particular, violated tenured public employees' constitutional guarantee of equal protection of the laws under both the State and Federal Constitutions.

Petitioner even invited the State High Court at Page 8, to perhaps devise a qualified immunity test in California to save the statute from constitutional attack, particularly for employment cases such as this one, involving significant issues of discrimination, retaliation and violations of free speech and whistleblower protections, for which a strong public policy exists to preserve and vindicate.

Further elaborating the concept of equal protection, Petitioner pointed out the to California's highest court the conflicting interpretations and inconsistent treatment of discretionary immunity by the lower state courts and asked it to address and resolve them.

To this effect, Petitioner cited, in addition to the cases in the Introduction to the instant Petition, *Barner v. Leeds* (1998) 62 Cal.App.4th 1240, 73 Cal.Rptr. 2d 296, *review granted* 7-22-98, *briefing completed* 12-17-98, in which two weeks prior to Petitioner's filing of her second Petition for Review, the California Supreme Court had granted review of an appellate court decision denying immunity under Section 820.2 of the *California Government Code* to a public defender sued for malpractice, under the rationale that all lawyers, public and private alike, should be held to the same standard, and reasoning that, for immunity to apply, the Legislature must expressly so provide, not the opposite.

Petitioner pointed out that the exact same immunity section was involved, public lawyers were involved in both cases, and that review was even more compelling in the instant case involving an immunity bar to constitutional and

civil rights violations, as opposed to the more mundane common law tort of professional negligence, yet review was again denied without explanation.

Acknowledging the inherent bias and understandable reluctance of state courts to invalidate a state statute on federal constitutional grounds and hand down a decision in Petitioner's favor potentially exposing the Court's own members to liability as public employees in supervisory positions themselves, [8] Petitioner nevertheless asked the Court to decide this important institutional question concerning the duties of public lawyers, and, once again asked for leave to amend to allege federal claims, again citing the Supremacy Clause of Article VI, Section 2 of the United States Constitution and that, even *Caldwell*, *supra*, 10 Cal.4th, at 989, n. 9, as pointed out at page 18 of Appellant's opening brief, had left open the door for federal and constitutional causes of action.

REASONS FOR GRANTING CERTIORARI

A. California's Official Immunity Statute Violates Equal Protection of Public Employees, Private Lawyers, and Civil Rights Litigants, All of which Petitioner has Standing to Assert:

1. Denial of equal protection of public employees

As repeatedly pointed out to all state courts below, *California Government Code* Section 820.2 violates equal protection because Petitioner, unlike Appellant in *Caldwell*, was a tenured public employee with a constitutionally-

[8] At oral argument, for example, Presiding Justice Croskey analogized to a hypothetical fact situation with one of his law clerks in rejecting Appellant's dual employment theory.

protected property right to the job that she lost. The rulings below deprive her of the opportunity to pursue a substantial portion of her case on a vicarious liability theory against the City of Los Angeles because public entities can only act through its individual supervisors and officials. If they are immune, so is the City by virtue of the derivative immunity provisions of *California Government Code* Section 815.2(b), which provides in pertinent part as follows:

> "Except as otherwise provided by statute, a public entity is not liable for an injury resulting from an act or omission of an employee of the public entity where the employee is immune from liability." *California Government Code Section* 815.2(b).

The rulings below also severely prejudice Petitioner by eliminating a potentially very significant measure of damages, since public entities are immune against punitive damages under *California Government Code Section* 818, and absolute discretionary immunity precludes her from recovering them against the individual Respondents.

Since Petitioner and other public employees like her would not be so barred were they to have worked in the private sector, an important equal protection issue of significant public concern arises because it impinges on a constitutionally property right, particularly because it impacts the statutory, ethical, and constitutional duties of lawyers, which further compels review by this Court.

2. Denial of equal protection of private lawyers

Discrimination, retaliation, and whistleblower statutes, as much as constitutional provisions are meant to apply across the board to protect all citizens, not just those in a particular sector of society. All appellate courts below were reminded

of this, as well of the additional requirement in the California Constitution that,

> "A citizen or class of citizens may not be granted privileges or immunities not granted on the same terms to all citizens. Privileges or immunities granted by the Legislature may be altered or revoked." California Constitution, Art. I, §7(b).

Accordingly, the decision below holds public lawyers to a lesser standard by virtue of the immunity provisions of Section 820.2 of the *California Government Code*. Not only does this immunity violate the equal protection guarantee of the Fourteenth Amendment of the United States Constitution, the federal question for review, but also, no adequate independent state ground can justify the ruling since it also violates California's own constitutional prohibition against denying privileges and immunities on the same terms to all citizens.

Thus, Petitioner, has standing to claim denial of equal protection not just as a former public employee, but also now as a private lawyer, and not just on her own behalf, but that of other private California lawyers similarly situated, since discrimination practices in the practice of law are *prohibited* pursuant to *California Rules of Professional Conduct, Rule* 2-400(B)(2), stating in pertinent part that "a lawyer shall not unlawfully discriminate in the management or operation of his or her law practice." The ruling below would allow Hahn and Hokinson to do so with total and complete impunity.

3. Denial of equal protection of civil right litigants

As pointed out to the California Supreme Court on Petition for Review at Page 14, and to the Court of Appeal

on Petition for Rehearing at Page 7, even straining, for the sake of argument, to find a compelling state interest for treating public and private employees differently despite the above constitutional language, there is no justification for allowing other similarly situated plaintiffs in civil rights litigation (except for the fact that they are African-American and Appellant is Hispanic) to proceed against similarly situated public employees in the same City Attorney's Office during the same time period as Petitioner, but not allow her to do the same on grounds of discretionary immunity. [9]

Of course, the individual defendants in those cases were not the elected City Attorney for Los Angeles—son of a legendary local politician, nor one of his Chief Assistants.[10]

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[9] Deputy City Attorney Lenore Lashley of the Civil Liability Division of the Los Angeles City Attorney's Office, formerly supervised by Hokinson during part of her tenure there, was allowed to proceed to trial against Assistant City Attorney Michael Fox on violations of *FEHA* and other unlawful employment practices, surviving demurrers brought on discretionary immunity by *identical* opposing counsel. *Lashley vs. Fox*, LASC Case No. BC 168467 (Trial scheduled to commence on July 13, 1998; case settled July 16, 1998).

And Claims Investigator Milton Crawford, a former co-worker of Appellant at the Department of Water and Power Legal Division, reached a sizeable confidential settlement in a race discrimination and retaliation case against the Department of Water and Power and its Chief Claims Agent, Harvey Lutske, who continued to report to Hokinson even after the settlement, after demurrers were overruled on the same discretionary immunity grounds. *Crawford vs. Department of Water and Power*, LASC Case No. BC 131493 (Judgment entered *under seal* May 20, 1998). Petitioner never worked on this case during the course of her employment at the Department; all information was obtained from the court files which Petitioner has reviewed.

[10] Appellant is informed and believes that Hahn and Hokinson, who were originally named in *Lashley v. Fox*, were voluntarily dismissed by Lashley for factual reasons having nothing to do with discretionary immunity.

But such clout cannot satisfy the strict scrutiny test for permitting such a blatant violation of Petitioner's equal protection rights.

B. Independent State Grounds Do Not Support the Judgment Adequately, or At All.

The trial court clearly sustained the demurrer of the individual Respondents *without leave to amend* on grounds of discretionary immunity pursuant to *Government Code* Section 820.2. Based upon the briefing, in which Petitioner participated, and the colloquy at the hearing on demurrer, at which Petitioner was present, the dispositive authority for the trial court's ruling was indeed *Caldwell v. Montoya, supra.*

The appellate court's opinion failed to address the legal, policy, and constitutional challenges to this basis for decision, which were the only three legal issues on appeal and expressly challenged *California Government Code* Section 820.2 on federal equal protection grounds. And, as other courts below, it even ignored the obvious: that no immunity attaches, by virtue of Section 814 of the *California Government Code,* to causes of action for declaratory and injunctive relief that Plaintiff's complaint prayed for.

Instead, the California Court of Appeal chose to give the following state grounds for affirming the judgment on discretionary immunity grounds pursuant to *California Government Code* §820.2, starting at A:17 of the opinion, as follows:

(1) That the acts or omissions complained of are discretionary in nature and hence immunized; (A:19-20).

(2) That the phrase "except as otherwise provided by statute" in *California Government Code* §820.2 does not mean that whenever a statute of general application creates a liability applicable to public employees the exception has been satisfied; rather, as held in *Caldwell*, it means that the immunity exists unless the statute creating liability expressly provides that the immunity does not apply; (A:20-21).

(3) That none of the statutes under which Petitioner claims evidence such an express intent to remove the immunity; (A:21-22).

(4) And finally, that Petitioner's state constitutional claims were "subject to" the immunity statute (A:22), but,

(a) that the law governing Hahn's or Hokinson's conduct was not clearly established ("that is, it is not at all clear just what constitutional right . . . (their) conduct violated" (A:23) (parenthesis added),

(b) nor could Hahn nor Hokinson have reasonably believed their conduct to be unlawful with respect to Petitioner(A:23).

These independent state grounds are all inadequate for the following reasons, in corresponding order:

(1) Petitioner's briefs explained why none of the acts or omissions alleged in the First Amended Complaint were discretionary, particularly where Hahn and Hokinson were under an affirmative, mandatory duty to undertake or abstain from them under City ordinances the compilation of which Hahn himself oversees, namely Section 4.400 of the *Administrative Code of the City of Los Angeles*.

Moreover, Petitioner cited state law authority for the proposition that whether or not Respondents' various acts or omissions are discretionary in nature is a question of fact for a jury, not an issue of law to be decided on demurrer. And none of the cases cited at A:18 of the opinion for the proposition that decisions to hire, fire, and institute disciplinary proceedings are discretionary acts entitled to immunity under *California Government Code* Section 820.2 raised the equal protection challenge raised by Petitioner or even alleged civil rights violations.

(2) The Supreme Court's requirement that every statute of the State of California, which includes the Constitution, would have to expressly provide that discretionary immunity under *California Government Code* Section 820.2 specifically does not apply to it or not, is absurd. Not only would this be unduly burdensome to the State Legislature to remember in every instance, but every article and section of the State's Constitution would have to be amended.

(3) The record before this Court is devoid of any basis or analysis in support such a finding. To the contrary, Petitioner asserted a violation of the *Labor Code* whistleblower statute. [11] In *SCRTD, supra* this very same Division 3 of the California Court of Appeal had held a very similar whistleblower statute applicable to state civil service employees under the *Government Code* to evidence such an express legislative intent, even though the statute in question did not expressly remove the immunity. The similarity between the two statutes was pointed out to the Court of Appeal at Page 10 of Petitioner's Reply Brief, to no avail.

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[11] *California Labor Code* Section 1102.5.

(4) And how can a constitutional guarantee be overridden by a state statutory immunity, Petitioner asked in her briefs but received no reply.

(a) Petitioner's First Amended Complaint, at A:28-73, contains 56 factually-detailed paragraphs and 16 causes of action outlining precisely when, where, why, how, and by whom, her common law, statutory, and constitutional rights were violated under clearly established state law.

Of course, the court chose to focus on Respondent's "spin" that she was insubordinate, and conveniently ignored what triggered it: protection of a legal client's interests in multi-million dollar and precedent-setting litigation, and most importantly, what preceded it: formal written complaints of discrimination, retaliation, and harassment based on sex and national, which Petitioner vigorously opposed but that Respondents have, to this day never redressed.

(b) And if Hahn and Hokinson, who are both lawyers and members of this Court, do not know what the law permits, requires, or forbids, then nobody does, since they are trained to know, and sworn to uphold, the tenets of both the State and Federal Constitutions, statutes, ordinances, rules, and regulations, argued Petitioner in her appellate briefs, particularly at Page 5 of the Petition for Rehearing, and at Page 12 of the Petition for Review.

But more importantly, such appellate fact-finding directly conflicts with this Court's views in *Wood v. Strickland* (1975) 420 U.S. 308, 322, 43 L.Ed.2d 214, 95 S.Ct. 992, in which the court explained this aspect of federal qualified immunity in the context of a 28 *U.S.C.* §1983 claim by a

student who had been improperly disciplined by a school official who, unlike Respondents, was not even a lawyer:

> "a school board member, who has voluntarily undertaken the task of supervising the operation of the school and the activities of the students, must be held to a standard of conduct based not only on permissible intentions, but also on knowledge of the basic, unquestioned constitutional rights of his charges. Such a standard imposes neither an unfair burden upon a person assuming a responsible public office requiring a high degree of intelligence and judgment for the proper fulfillment of its duties, nor an unwarranted burden in light of the value which civil rights have in our legal system." *Ibid.*, 322.

Supreme Court review cannot be evaded by reliance on a state ground "so certainly unfounded that it properly may be disregarded as essentially arbitrary, or a mere device to prevent a review of the decision upon the federal question" *Enterprise Irrig. District v. Farmers Mut. Canal Co.* (1917) 243 U.S. 157, 164 (1917) 61 S.Ct. 644, 37 L.Ed. 318. This principle has had its most frequent application in situations where a rule of state pleading or procedure has been used unreasonably to avoid a decision relative to federal rights, particularly where not consistently followed by the state's courts. *See, eg., NAACP v. Alabama (ex rel. Patterson)* (1958) 357 U.S. 449, 455-58, 2 L.Ed. 1488, 78 S.Ct. 1163, as well as *Barr v. City of Columbia* (1964) 378 U.S. 146, 149, 12 L.Ed.2d 766, 84 S.Ct. 1734. But it applies with all the more force where, as here, a strained reading of the facts, in conflict with federal law, is used to avoid constitutional challenge to a substantive state statute which is not consistently or reasonably interpreted.

C. Subsequent Proceedings below as to the City of Los Angeles Do Not Moot review; they Compel it.

At oral argument on March 17, 1998, Petitioner informed the California Court of Appeal that, under pressure from the judge to pare down her case for trial, she had dismissed three causes of action: breach of contract, and for violations of the *Meyers-Millias-Brown Act* [12] and the state's *Equal Pay Act.* [13]

Petitioner also informed the appellate court at oral argument that summary judgment against Petitioner had been entered as to all remaining causes of action on March 11, 1998, and that an appeal would follow, which was eventually timely filed on April 24, 1998 and is pending briefing.

Four days after that second appeal was filed, the trial judge ordered Petitioner to pay the City of Los Angeles the full sum of $111,845.19 in attorneys' fees and costs requested by the City's lawyers, over Petitioner's vigorous Opposition to the City's motion, and despite Petitioner's detailed Motion to Tax Costs, supported by legal precedent from this very Court. A timely appeal was also taken from that order by Petitioner on April 24, 1998 and is similarly pending briefing.

And, despite Respondents' request at oral argument that argument and decision be deferred and consolidated with the coming appeals, the appellate court proceeded to hear argument and decide the appeal as to the individual Respondents.

All of the foregoing subsequent procedural history of the case was brought to the California Supreme Court's attention

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[12] *California Government Code* Section 3506.

[13] *California Labor Code* Section 1197.5.

in the second Petition for Review, and does not moot certiorari review. A significant issue of judicial bias and violation of Petitioner's due process rights exists due to the trial judge's failure to recuse himself when requested to do so by Petitioner for failure to disclose the fact that his second-cousin is employed by Respondents as a Deputy City Attorney, and the judge's categorical refusal to follow established state procedures for having the issue of his disqualification decided by a fair and impartial judge.

Judge Richard Kalustian, the trial judge in this matter, is the same former District Attorney who many years ago prosecuted and convicted civil rights leader Geronimo Pratt, whose case was just argued, on December 15th past, to the California Court of on grounds that exculpatory evidence was withheld by the prosecution.

This fact was adduced by Petitioner in her request for disqualification of the trial judge in this matter when his cousin contradicted in a sworn affidavit the judge's claim that he was not aware that he had a second cousin who was a prosecutor in the Los Angeles City Attorney's Office. Despite all of this, he continued to preside over the case.

Not surprisingly, he subsequently retaliated against Petitioner by all sorts of adverse rulings that summarily dismissed her *entire* case in piecemeal fashion without a fair day in court, and ultimately granting all of Respondents motions in the their entirety. He even ordered Petitioner and her former attorney $2,400.00 in monetary sanctions for attempting to depose his cousin and trying to protect the attorney-client privilege of Petitioner's former client, the Department of Water and Power, during the course of discovery in this case.

The evident bias of the trial judge in this matter voids all subsequent judgments and orders currently on appeal as a matter of state law and fundamental notions of fairness and procedural due process guaranteed by both the State and U.S. Constitutions.

In addition, the case against the City of Los Angeles is legally different from the case against the individual Respondents since by virtue of Section 815.2(b) of the *California Government Code* Petitioner cannot proceed on a *vicarious liability theory*. Thus her case against the public entity must establish what the City itself, as opposed to these individual Respondents did or failed to do to violate her common law, statutory, and constitutional rights.

D. Certiorari Jurisdiction Permits a Reexamination of the Facts by this Court under the Circumstances of this Case

While this Court understandably will not exert its jurisdiction merely to review a question of fact, where a federal right has been denied as a result of a finding shown by the record to be without evidence to support it; or where a conclusion of law as to a federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts, this Court will review a state court's findings. *Fiske v. Kansas* (1927) 274 U.S. 380, 385-86, 71 L.Ed. 1108, 47 S.Ct. 655.

Pursuant to the second exception, this Court has frequently made an independent examination of facts that are intermingled with legal conclusions when necessary to decide whether a person has been deprived by a state court of a right secured by the U. S. Constitution, or where some other federal interest has been unduly subordinated by a state court. *See eg., Letter Carriers v. Austin* (1974) 418 U.S.

284, 41 L.Ed. 2d 745, 94 S.Ct. 2770 (findings as to the right of free expression in the context of labor disputes). *NAACP v. Claiborne Hardware Co.* (1982) 458 U.S. 886, 915 n.50, 73 L.Ed. 2d 1215, 102 S.Ct. 3409; (findings as to alleged denials of political speech and freedom of association rights under the U.S. Constitution); and *New York Times Co. v. Sullivan* (1964) 376 U.S. 254, 285, 11 L.Ed.2d 686, 84 S.Ct. 710 (findings to support elements of malice or falsity in state court libel actions, which is comparable to the discriminatory and retaliatory or bad faith animus required for some of Petitioner's causes of action passed on by the courts below).

The distorted fact-finding by the courts below, as to both the discretionary nature of the acts or omissions complained of and the bona fides of Hokinson and Hahn vis-a-vis Petitioner, qualifies under both of the above exceptions to further invoke this Court's review of the facts alleged in the operative First Amended Complaint appended to this Petition at A:28-73 to prevent a serious miscarriage of justice.

IMPORTANCE OF THE QUESTION PRESENTED

A. To Lawyers

Public and private lawyers alike across this country are demeaned by the decision below. As the California Court of Appeal in *Barner, supra,* reasoned at 73 Cal. Rptr., 301, there is no reason to hold these two categories of lawyers to different standards.

It defies logic and offends ethics to give full license to these two public servants—who in this case both happen to be highly-placed public officials and also lawyers, who each, on more than one occasion, first by virtue of their profession and again upon the occasion of taking public office, swore a

solemn oath, to obey and uphold the Constitution and laws of this country—and to allow them to violate this country's most cherished civil liberties with impunity, secure in the belief that they will not be held accountable even if they abuse their authority and power.

This Court rejected a that notion of absolute sovereign immunity indirectly as to a sitting President of the United States in *Clinton v. Jones* (1997) __U.S.__, 137 L.Ed.2d 945, 117 S.Ct. 1636 by refusing to extend presidential immunity to stay a 42 *U.S.C.* §1983 suit for unofficial sexual harassment acts. If not even presidents are above the law, how can California grant its public officials, including its public lawyers, absolute discretionary immunity?

B. To Discrimination and Employment Law

This case affects not just the individual rights of Petitioner before you, but those of the many other victims of civil rights violations and unlawful employment practices, some of whom she now represents in private practice.

As Petitioner pointed out in her policy arguments to the courts below, for a state that is the nation's leader in protecting the rights of victims in employment and civil rights litigation, extending the California Supreme Court's narrow holding in *Caldwell* to the materially different facts of this case is not only contrary to the State's highest court's own holding in *Robinson v. FEHC* (1992) 2 Cal.4th 226, 58 FEP Cases 887, requiring California courts to construe *FEHA* broadly in order to effectual its remedial purpose, but also repugnant to the doctrine of federal qualified immunity.

C. To the Efficient Administration of Justice

To have the law of this Great State at odds with federal qualified immunity law serves only to force public sector litigants into the overcrowded federal docket, to litigate what is essentially a state-law civil rights case, so as to be able to hold individual public officials accountable and not have the taxpayers left holding that proverbial bag.

CONCLUSION

At this precise moment in our nation's history when the accountability of public officials to the rule of law is being tested and reaffirmed, this case, and the principle of equal justice under law that it embodies and is emblazoned on the frieze of the entablature at the entrance to this Court's building, must not escape this Court's scrutiny, even if lower state courts have chosen to avoid deciding it.

Section 820.2 of the California Government Code, as applied by California courts to public employees, which in this case also happen to be officers of this Court, violates the Equal Protection Clause of the United States Constitution. This issue has been raised at every possible stage of the proceedings but ignored by every court below. And adequate and independent state grounds do not otherwise support the judgment.

Additionally, California courts have unreasonably denied Petitioner's request, if California law will not protect her, for leave to amend to allege federal causes of action against the individuals responsible for her tremendous injuries and damages as well as the irreplaceable loss to her personal and professional dignity and reputation, which no state immunities would or could ever bar.

For all of these reasons, this Petition for a Writ of Certiorari to the California Supreme Court should be GRANTED.

Respectfully submitted, this 19th day of December, 1998.

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Torrance, CA 90501-1451
Telephone: (310) 320-4800

APPENDIX

Pages

September 23, 1998 Order of the California Supreme Court denying review on appeal A:1

July 29, 1998 Order of the California Court of Appeals denying rehearing A:2

June 29, 1998 Opinion of the California Court of Appeal A:3-23

September 24, 1997 Order of the California Supreme Court denying review on writ A:24

August 5, 1997 Order of the California Court of Appeal denying petition for writ of mandate A:25

August 7, 1997 Order of Dismissal on demurrer from the Superior Court of California for the County of Los Angeles A:26-27

April 24, 1997 First Amended Complaint.....A:28-73

Second Appellate District, Division Three, No. B115722
S072487

IN THE SUPREME COURT OF CALIFORNIA

OLGA H. GARAU, Appellant

v.

JAMES K. HAHN Et Al., Respondents

SUPREME COURT
FILED
SEP 23 1998
Robert Wandruff
Clerk
DEPUTY

Appellant's petition for review DENIED.

GEORGE

Chief Justice

OFFICE OF THE CLERK
COURT OF APPEAL
STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT
JOSEPH A. LANE, CLERK

DIVISION: 3 DATE: 07/29/98

Law Offices of
Olga H. Garau
2291 205th Street
Suite 102
Torrance, CA. 90501 1254

RE: Garau, Olga H.
vs.
Hahn, James K.
2 Civil B115722
Los Angeles NO. BC168531

THE COURT:

Petition for rehearing denied.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

OLGA H. GARAU,
Plaintiff and Appellant,

V.

JAMES K. HAHN AND THOMAS C. HOKINSON,
Defendants and Respondent,.

BI 15722
(Super. Ct. No. BC 168531)

COURT OF APPEAL - SECOND DISTRICT
F I L E D
JUN 29, 1998
JOSEPH A. LANE, CLERK

APPEAL from an order of the Superior Court of Los Angeles County. Richard P. Kalustian, Judge. Affirmed.

Olga H. Garau, in pro per, for Plaintiff and Appellant.

Rushfeldt, Shelley & Drake, Linda C. Miller and Erica A. Levitt for Defendants and Respondents.

Plaintiff Olga Garau ("plaintiff'), a former employee of the City of Los Angeles ("City"), has sued the City and two of its other employees. Those defendant employees are the City's City Attorney, James K. Hahn ("Hahn"), and Hahn's Chief Deputy City Attorney for the legal department of the City's Department of Water and Power, Thomas C. Hokinson ("Hokinson" and "DWP," respectively).

Plaintiff, a former deputy city attorney, has appealed from the order which dismissed Hahn and Hokinson as defendants from this case with prejudice. That order was based on an order which sustained, without leave to amend, general demurrers by Hahn and Hokinson to plaintiff's first amended complaints[1]. The bases of the demurrers were the discretionary immunity provisions in the Government Code and the contention that, as a matter of law, Hahn was not an "employer" of plaintiff and so could not be liable to her as to those causes of action which are dependent upon an employer-employee relationship. We conclude the trial court properly found that the alleged conduct of Hahn and Hokinson is covered in the discretionary immunity provisions of the California Tort Claims Act and that Hahn was not an "employer" of plaintiff. We therefore affirm the order of dismissal.

FACTUAL AND PROCEDURAL BACKGROUND [2]

1. Plaintiffs General Allegations Against Defendant:

In her first amended complaint (hereinafter, the "complaint"), plaintiff alleged that the City and Hahn were her employers and also Hokinson's employers, and the City delegated the power to make critical employment decisions such as hiring and firing, layoff, demotion, and discipline of deputy city attorneys to Hahn. Plaintiff was employed as a deputy city attorney from August 11, 1986 to April 7, 1997. By August 11, 1988, having satisfactorily completed the required two years of employment, she became a tenured employee who could (under section 42(10) of the City's

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[1] Demurrers filed by the City were also sustained by the trial court to certain of plaintiff's causes of action, but plaintiff does not challenge that ruling in this appeal.

[2] As this matter comes to us on demurrer, we accept as true all of the material allegations of the complaint. 'Ihose allegations serve as the basis for the facts which we recite-below

Charter) only be terminated for cause. When she joined DWP's employee relations section in 1995, defending labor and employment matters for DWP, "she automatically came under the union representation of the Confidential Attorneys' Bargaining Unit of the Engineers and Architects Association. Different bargaining units of that union also represent DWP employees who on occasion bring grievances and lawsuits against [DWP] that Plaintiff defended." A still different bargaining unit of that association represents the management attorneys, such as Hokinson. Plaintiff did not pay dues to that union so that she would avoid the appearance of impropriety to DWP and the public.

In November 1995, plaintiff complained to Hokinson, and to her immediate supervisor Terso Rosales ("Rosales"), "that the collective bargaining rights of confidential attorneys such as plaintiff were being compromised in that the union that supposedly represents them is the same one that plaintiff was opposing and prevailing against in labor and employment matters on behalf of... DWP." "Plaintiff was then immediately dissuaded and precluded from making a full disclosure of this fact to [DWPJ as required by the Rules of Professional Responsibility ... because, according to her supervisors, [DWP] might use it as an excuse to hire outside conflict counsel." Plaintiff was told to address her concerns to Hahn and to "use a paper shredder to destroy drafts of her disclosure containing censored language." Plaintiff wrote to Hahn on December 4, 1995, regarding this matter but he never replied. The next week, Hokinson issued a memo which stated his prior approval was needed for "the content of all correspondence addressed to [Hahn], DWP officials, the Mayor, City Council members, and other key City officials."

In May 1996, plaintiff confronted Rosales about a letter of recommendation he had written on behalf of another attorney in the unit, someone with less seniority and legal

experience than plaintiff. The letter was contrary to merit and promotion guidelines. This other attorney received both a promotion and a merit step. Rosales admitted writing it "because he wanted to make sure that the female Caucasian attorney in question was promoted 'this time.' " Mr. Rosales, a Filipino, would not agree to write such a letter for plaintiff, who is of Cuban ancestry. Hokinson is Caucasian, as is Hahn.

Plaintiff requested a promotion in March 1996, which Hahn denied. Her accomplishments were omitted from Hokinson's merit and promotion evaluation of plaintiff which had been submitted to Hahn. However, she did receive a minimal merit step in June 1996 with Hahn's approval. The only reason given by Hahn for denial of a promotion for plaintiff was a "boilerplate, pre-printed excuse given to everyone regarding the limited number of promotional positions available." Hokinson became angry when plaintiff "raised the specter of discrimination" at the time she asked him why she had not been promoted. The only female Hispanic attorney in DWP's legal department other than plaintiff had "abruptly" transferred out of that department in August 1996 after being there less than one year. This other employee had complained to plaintiff that she was being treated differently from the Caucasian attorney in the legal department, and plaintiff believes that the other attorney was also denied a promotion.

In October 1996, plaintiff complained in writing to Hahn about disparate treatment of the female Hispanic attorneys in DWP's legal department. Hahn wrote he was too busy to deal with plaintiff's complaint and referred her to one of his civil branch chiefs. Plaintiff's complaint was not investigated. Also, in October 1996, plaintiff learned she had been excluded from telephone conversations with a federal mediator and opposing counsel even though she had a right to participate in these conversations as counsel of record for DWP regarding a major federal appellate case. The deputy

city attorney who excluded her, a Caucasian male, also tried to "exclude and limit her oral argument before the Ninth Circuit on March 6, 1996 in one of the other major federal appellate cases that [plaintiff] was handling."

A male Caucasian deputy city attorney who represented all City departments except DWP, had obtained a 30-day extension on submission of a brief (on which plaintiff was working as co-counsel) without telling plaintiff. She had "worked frantically to file DWP's opening brief' because she was not aware of the extension. Plaintiff complained about the conduct of her co-counsel in a written motion which she filed with the Ninth Circuit in October 1996 "to protect the legal interests of [DWP] against unnecessary additional prejudice and delay of the appeal. This Caucasian male deputy city attorney complained to Hokinson, who in turn, with authorization from Hahn, ordered plaintiff to withdraw the motion because Hahn had been "embarrassed" by plaintiff a accusation of misconduct against one of his other deputies working on the same case. When plaintiff asked Hokinson to have DWP informed of what was happening, he refused, made her attend a hostile meeting with four male Caucasian deputy city attorneys, and threatened to reassign the federal cases in question. Hokinson refused plaintiff's request to have the highest available representative from DWP attend the meeting to set forth DWP's position.

Plaintiff refused to withdraw her motion, "citing her legal and ethical obligations to [DWP]." As a consequence, the four Fair Labor Standards Act cases previously assigned to her, which "she had previously handled with such extraordinary success," were reassigned in November 1996. 'The cases involve "multi-million dollar claims for overtime at time-and-a-half by top DWP and City managers, professionals, and executives." Plaintiff was then assigned to cases having "significantly less legal complexity and monetary exposure," leaving her in the embarrassing position of having to deal with questions from coworkers about the

cases which were taken from her. Additionally, plaintiff suffered humiliation by having her written work, cases, and court appearances closely scrutinized by her supervisors on a regular basis, which had not happened before.

In December 1996, defendants gave plaintiff an investigation report of her conduct and threatened discipline, including termination for "alleged insubordination and 'false' accusations of misconduct against the male Caucasian Assistant City Attorney." Plaintiff complained in writing of discrimination, retaliation and harassment and defendants tried to force her to quit by threatening to fire her under an unconstitutionally vague section of the City's charter. Plaintiff was not given prior notice of the civil service disciplinary guidelines she is accused of violating, and moreover, they do not apply to her because deputy city attorneys are exempt from civil service.

On March 21, 1997, after plaintiff had filed a written tort claim against the City, Hahn, and Hokinson, and had filed charges with the Department of Fair Employment and Housing ("DFEH"), Hokinson gave plaintiff a written notice that Hahn intended to fire her and gave her one week to respond[3]. Four days later, on March 25, Hokinson contacted plaintiff s attorney and requested a dollar amount to settle plaintiff's claim against the City and her DFEH charges. The next day, plaintiff's attorney responded in writing to the request, but defendants did not reply before the offer lapsed by its own terms. Therefore, on April 1, 1997, plaintiff filed this suit.

On April 3, 1997, Hokinson informed plaintiff that she would not be getting her automatic and mandatory anniversary pay step increase which is based on work performance, pending the outcome of the pending disciplinary matter against her, despite the fact that Hokinson

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[3] Plaintiff's tort claim was denied by operation of law and DFEH issued her right to sue letters as to all three defendants.

had admitted to plaintiff in the presence of her immediate supervisor and her attorney on March 21 that plaintiff s work performance was "above question." Also, on April 3, 1997, Rosales and Hokinson refused to permit plaintiff to give representatives from DWP a disclosure as the attorney of record on a case, or even to meet with them to explain what was happening in the case. Plaintiff had inquired of the State Bar about her ethical responsibilities to DWP regarding her lawsuit against the City and the proposed termination of her employment. The State Bar informed her she was required to make the disclosure to DWP about those matters, but Hokinson and Rosales refused to allow her to make the disclosure to DWP representatives.

On April 4, plaintiffs attorney received an April 2 letter from the City Attorney's personnel director giving plaintiff a new deadline to respond to the proposed termination. On April 7, plaintiff tendered a notice of constructive tertmination/forced resignation. The resignation was accepted by the City Attorney's personnel director on April I I by memo. Her termination was deemed effective as of April 7, 1997.

2. The Specific Causes of action in the Complaint

Plaintiff alleged causes of action against the City, Hahn and Hokinson for breach of statutory duties under the California Fair Employment and Housing Act, (Gov. Code, § 12900 et seq., "FEHA"), the Tom Bane Civil Rights Act (the "Bane Act") (Civ. Code, § 52.1)[4], and the Ralph Civil

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[4] The substantive, non-procedural provisions of Civil Code section 52.1 are set out in subdivisions (a) and (b) as follows:

" (a) Whenever a person or persons, whether or not acting under color of law, interferes by threats, intimidation, or coercion, or attempts to interfere by threats, intimidation, or coercion, with the exercise or enjoyment by any individual or individuals of rights secured by the Constitution or laws of the United States, or of the rights secured by the Constitution or laws of this state, the Attorney General, or any district attorney or city attorney may bring a civil action for injunctive and other

Rights Act of 1976 (the "Ralph Act") (Civ. Code, § 51.7);[5] for infringement of free speech and the right to petition government for redress of grievances in violation of the state constitution; for denial of substantive and procedural due process in violation of the state constitution; for denial of equal protection in violation of the state constitution; for violation of the state constitution's anti-discrimination clause; for abuse of official authority in violation of public policy;

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appropriate equitable relief in the name of the people of the State of California, in order to protect the peaceable exercise or enjoyment of the right or rights secured.

"(b) Any individual whose exercise or enjoyment of rights secured by the Constitution or laws of the United States, or of rights secured by the Constitution or laws or this state, has been interfered with, or attempted to be interfered with, as described in subdivision (a), may institute and prosecute in his or her own name on his or her own behalf a civil action for damages, including, but not limited to, damages under Section 52, injunctive relief, and other appropriate equitable relief to protect the peaceable exercise or enjoyment of the right or rights secured."

[5] Civil Code section 51.7 provides:

"(a) All persons within the jurisdiction of this state have the right to be free from any violence, or intimidation by threat of violence, committed against their persons or property because of their race, color, religion, ancestry, national origin, political affiliation, sex, sexual orientation, age, disability, or position in a labor dispute, or because another person perceives them to have one or more of those characteristics. The identification in this subdivision of particular bases of discrimination is illustrative rather than restrictive.

"This section does not apply to statements concerning positions in a labor dispute which are made during otherwise lawful labor picketing.

"(b) As used in this section, 'sexual orientation' means heterosexuality, homosexuality, or bisexuality."

for intentional infliction of emotional distress; and for negligence per se.

Plaintiff also alleged causes of action against the City and Hahn for breach of statutory duties imposed by the California Equal Pay Act, (Labor Code, § I 1 97.5)[6] the Labor Code Whistleblower Statute (Labor Code, § II 02.5),[7]

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[6] The substantive, non-procedural and non-administrative provisions of Labor Code section 1197.5 are set out in subdivisions (a), (b) and (g), as follows:

"(a) No employer shall pay any individual in the employer's employ at wage rates less than the rates paid to employees of the opposite sex in the same establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where the payment is made pursuant to a seniority system, a merit system, a system which measures earnings by quantity or quality or production, or a differential based on any bona fide factor other than sex.

"(b) Any employer who violates subdivision (a) is liable to the employee affected in the amount of the wages, and interest thereon, of which the employee is deprived by reason of the violation, and in an additional equal amount as liquidated damages.

"....

"(g) Any employee receiving less than the wage to which the employee is entitled under this section may recover in a civil action the balance of the wages, including interest thereon, and an equal amount as liquidated damages, together with the costs of the suit and reasonable attorney's fees, notwithstanding any agreement to work for a lesser wage."

[7] Labor Code section 1102.5 provides:

"(a) No employer shall make, adopt, or enforce any rule, regulation, or policy preventing an employee from disclosing information to a government or law enforcement agency, where the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or violation or noncompliance with a state or federal regulation.

and the Meyers-Milias Brown Act (Gov. Code, § 3506);[8] for anticipatory breach of the statutory duty to discipline and terminate tenured public employees only for good cause; and for constructive wrongful termination in violation of public policy. These causes of action can only be asserted against an "employer."

3. The Demurrers

Hahn and Hokinson demurred generally to all causes of action on the ground of governmental immunity for discretionary decisions under Government Code section 820.2. Hahn also separately demurred to the causes of action for violation of the Equal Pay Act, the Labor Code Whistleblower Statute, and the Meyers-Milias Brown Act,

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"(b) No employer shall retaliate against an employee for disclosing information to a government or law enforcement agency, where the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or violation or noncompliance with a state or federal regulation.

"(c) This section shall not apply to rules, regulations, or policies which implement, or to actions by employers against employees who violate, the confidentiality of the lawyer-client privilege of Article 3 (commencing with Section 950), the physician-patient privilege of Article 6 (commencing with Section 990) of Chapter 4 of Division 8 of the Evidence Code, or trade secret information."

[8] Government Code section 3506 provides: "Public agencies and employee organizations shall not interfere with, intimidate, restrain, coerce or discriminate against public employees because of their exercise of their rights under Section 3502."

Government Code section 3502 provides: "Except as otherwise provided by the Legislature, public employees shall have the right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations. Public employees also shall have the right to refuse to join or participate in the activities of employee organizations and shall have the right to represent themselves individually in their employment relations with the public agency."

and the cause of action for constructive wrongful discharge on the ground he was not plaintiff's employer. The trial court ruled that Hahn's and Hokinson's demurrers to the entire complaint were well taken and sustained them without leave to amend on those two grounds. An order of dismissal with prejudice was signed and filed on August 7, 1997.[9] Plaintiff then filed this timely appeal.

CONTENTIONS ON APPEAL

In her appeal, plaintiff contends the trial court erroneously applied governmental immunity to Hahn and Hokinson and erroneously concluded that Hahn was not plaintiff's employer. Hahn and Hokinson respond that all of plaintiff's causes of action which name them as defendants fail because of the provisions of Government Code section 820.2, the discretionary immunity statute. Hahn also argues that he cannot, as a matter of law, be considered plaintiffs "employer" and therefore those causes of action in which he

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[9] The trial court's order of dismissal provided, in relevant part:

"The court, after reviewing the moving and opposing party papers, and listening to argument of counsel, finds that the demurrer to the entire first amended complaint is sustained without leave to amend as to defendants HAHN and HOKINSON. As to the second, fifth, sixth and sixteenth causes or action, the demurrer is sustained without leave to amend on the grounds that HAHN was not plaintiffs employer.

"The demurrer is further sustained without leave to amend on the grounds that plaintiff s allegations against HAHN and HOKINSON arise from discretionary personnel/management related decisions and HAHN and HOKINSON are thus immune from liability pursuant to Government Code § 820.2.

"IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the demurrer or defendants JAMES K. HAHN and THOMAS C. HOKINSON be sustained without leave to amend and that defendants HAHN and HOKINSON be dismissed with prejudice from this action."

is named and which depend upon an employer-employee relationship, state no actionable claim against him.

We agree with Hahn's and Hokinson's arguments and will affirm the trial court's order of dismissal.

DISCUSSION

1. *Standard of Review*

This case comes to us on an appeal from the sustaining of a demurrer without leave to amend. "In reviewing the sufficiency of a complaint against a general demurrer, we are guided by long-settled rules. 'We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation] We also consider matters which may be judicially noticed.' [Citation.] Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.] When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause or action. (Citation-]" *(Blank v. Kirwan* (1985) 39 Cal.3d 311, 318 [216 Cal.Rptr. 718, 703 P.2d 58].) Irrespective of the labels attached by the pleader to any alleged cause of action, we examine the factual allegations of the complaint, "to determine whether they state a cause of action on any available legal theory." *(Ellenberger v. Espinosa* (1994) 30 Cal.App.4th 943, 947; *Saunders v Cariss* (1990) 224 Cal.App.3d 905, 908.) If they do, then the trial court's order or dismissal must be reversed. *(Platt V. Caldwell Banker Residential Real Estate Services (I* 990) 217 Cal.App.3d 1439, 1444.) If they do not, then we must affirm.

Even if the complaint does not state a cause of action, the court determines whether the plaintiff should have been granted leave to amend, and applies an abuse of discretion standard to such determination. *(Hendy v. Losse* (1991) 54 Cal.3d 723, 742.) "If there is a reasonable possibility that the defect in a complaint can be cured by amendment, it is an abuse of discretion to sustain a demurrer without leave to

amend. [Citation.] The burden is on the plaintiff, however, to demonstrate the manner in which the complaint might be amended" to state a viable cause of action. *(Ibid.)* Such a demonstration may be made to the appellate court in the first instance. *(Careau & Co.* v. *Security Pacific Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1386.)

In *Gates v. Superior Court* (1995) 32 Cal.App.4th 481, the court, quoting from *Lopez v. Southern Cal. Rapid Transit Dist.* (1985) 40 Cal.3d 780, 795, 796, stated that "Because the present case involves claims against public employees and is controlled by the California Tort Claims Act, the following rules apply: 'However, because under the Tort Claims Act all governmental tort liability is based on statute, the general rule that statutory causes of action must be pleaded with particularity is applicable. Thus, "to state a cause of action against a public entity, every fact material to the existence of its statutory liability must be pleaded with particularity." '.... It is a plaintiff's responsibility to plead' "facts sufficient to show [his or her] cause of action lies outside the breadth of any applicable statutory immunity" *(Id.* at pp. 493-494, citations omitted.)

2. Hahn Was Not Plaintiffs Employer

As a threshold matter, we summarily dispose of plaintiff's claim that Hahn was her employer. Plaintiff argues that her allegation that Hahn had an employment relationship should withstand demurrer since we must accept the allegations in a complaint as true. However, as noted above, that rule applies only to *factual* allegations; it does not apply to a legal conclusions Certainly, the assertion that Hahn was plaintiff s employer is, in the context of this case, a legal conclusion for which plaintiff cites no persuasive authority whatsoever.[10]

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[10] Plaintiff cites, for example, Labor Code section 3300. Although not disclosed in plaintiff s brief, we note that section 3300 deals with workers' compensation law. It provides that the term "employers," as used in that body of law means: "(b) Each county, city, district, and all ...

In its essence, plaintiff s argument is based on the borrowed servant or "captain of the ship" doctrines which have been applied, for example, between hospital physicians and staff nurses and medical assistants. Even though such hospital staff personnel are selected, hired and paid by the hospital, during a surgery they may be regarded as the temporary employees of the head surgeon. (See e.g., *Ybarra v. Spangard* (1944) 25 Cal.2d 486, 492.) However, this seems to us to be a poor analogy. In *Ybarra, for* example, the "temporary employee" rule was involved to impose respondeat superior liability on the surgeon for the negligent acts of the assisting hospital staff which led to plaintiff s injuries. Here plaintiff seeks to extend that rule to impose upon Hahn liability to her for obligations only due from an employer.[11] Given that the City is capable of fully responding to plaintiff for any statutory or other wrongs which may have been committed by Hahn in the City's name, we see no reason to adopt plaintiffs tortured reasoning and attempt to broaden the application and understanding of the borrowed servant doctrine.

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public agencies therein. [¶] (c) Every person 'including any public service corporation, which has any natural person in service. [and] [¶] (d) The legal representative of any deceased employer." This statute is clearly of no help to us at all. Even plaintiff does not contend that Hahn was required to personally provide to her, or any of the other Deputy City Attorneys, worker's compensation insurance coverage.

11 Plaintiff also cites *Kowalski v. Shell Oil Co.* (1 979) 23 Cal.3d 168, as additional support for her argument. In that case, the "special employer" doctrine was discussed in the context of whether plaintiffs injuries were compensable in tort or only under the worker's compensation system. Again, the court there emphasized that the power to control and supervise is critical in determining whether a special relationship existed. (Id. at pp. 174-175.) We find this case is likewise of no assistance to plaintiff who is trying to fit a square peg in a round hole. The nine criteria she lists for determining whether an employee is the borrowed servant of another employer simply have no application to the factual circumstances presented here.

Plaintiff was an employee of the City who happened to work in a division of the City government known as the Office of the City Attorney. That the terms and duration of her employment and the assignment and supervision of her duties were Hahn's responsibility does not under any existing legal doctrine, convert the person of the City Attorney into her employer. Apart from its lack of supporting authority, such a result would undermine the broad statutory scheme of immunities established by the Legislature, one of which, as we discuss below is dispositive or this case in any event.

Plaintiff's second cause of action (Lab. Code, § II 97.5), fifth cause of action (Lab. Code, § I 1 02.5), sixth cause of action (Gov. Code, § 3506), seventh cause of action (anticipatory breach of plaintiff's employment tenure rights under Charter section 42 (10)(b)), and sixteenth cause of action (constructive wrongful termination in violation of public policy) all apply to claims against a public employer. As Hahn was not, as a matter of law, plaintiff's employer, she can state no claim against him on any of these theories. The trial court's ruling on Hahn's demurrer on this ground was clearly correct.

However, as we have already suggested, a relevant provision of the Government Code establishes that both Hahn and Hokinson are, in any event, entitled to immunity as to all of plaintiff's claims. We now discuss that issue.

3. Hahn and Hokinson Have Immunity

Government Code section 820.2 provides: "Except as otherwise provided by statute, a public employee is not liable for an injury resulting from his act or omission where the act or omission was the result of the exercise of the discretion vested in him, whether or not such discretion be abused" (hereafter, "section 820.2").

In discussing what constitutes a discretionary act, *Johnson v. State of California* (1968) 69 Cal.2d 782, 788 noted: " 'Generally speaking, a discretionary act is one which requires the exercise of judgment or choice. . . .' '[A]

discretionary act is one which requires "personal deliberation, decision and judgment" while an act is said to be ministerial when it amounts "only to ... the performance of a duty in which the officer is left no choice of his own." ' [Citations.]" However, the *Johnson* court held that since all acts involve some choice among alternatives, the statutory immunity extended by section 820.2 cannot depend upon a literal or semantic parsing of the word "discretion." (Id. at pp. 787-790.) As the Supreme Court later commented,". . . *Johnson* concluded [that] a 'workable definition' of immune discretionary acts draws the line between 'planning' and ,operational' functions of government. [Citation.] Immunity is reserved for those *'basic policy decisions* [which have] ... been [expressly] committed to coordinate branches of government,' and as to which judicial interference would be 'unseemly.' [Citation.] Such 'areas of quasi-legislative policy-making . . . are sufficiently sensitive' [citation] to call for judicial abstention from interference that 'might even in the first instance affect the coordinate body's decision-making process' [Citation]." (*Caldwell v. Montoya* (1995) 10 Cal.4th 972, 981.)

The application of this careful and restrictive analysis of discretionary immunity by the *Johnson* court has repeatedly led to the conclusion that a public employer's decision to hire, fire and institute disciplinary proceedings is within the discretionary acts covered by section 820.2. *(Summers v. City of Cathedral City* (1990) 225 Cal.App.3d 1047, 1064-1065 [decision to terminate employee is discretionary and immunity applies]; *Kemmerer v. County of Fresno* (1988) 200 Cal.App.3d 1426, 14371439 [decision to institute and prosecute disciplinary proceedings against employee is discretionary and immunity applies]; *Jones v. Oxnard School Dist.* (1969) 270 Cal.App.2d 587, 593 [decision to hire is discretionary and immunity applies].) The principles articulated in these cases would seem to have equal application to the employment decisions made here by Hahn, a public

official directly responsible to the electorate for the proper and efficient management of his office.

In this case, plaintiff has alleged a series of specific acts which she claims, under different statutory and common law theories, amount to actionable misconduct. For example, she alleges: (1) Hokinson, who was plaintiff's immediate supervisor, issued a memorandum requiring his prior approval of correspondence addressed to Hahn or other City officials after plaintiff had sent a letter complaining about certain matters directly to Hahn; (2) Hahn denied her request for a promotion and referred her complaints regarding alleged discrimination to subordinates who were in charge of the Civil Branch; (3) both Hahn and Hokinson ordered her to withdraw a motion which she had filed with the United States Ninth Circuit Court of Appeals which accused another City Attorney (who was her co-counsel on a *pending* appeal) of misconduct in obtaining an extension of time to file a brief without telling her about the request; (4) when she failed to obey that order to withdraw such motion, despite the serious embarrassment it doubtless caused to Hahn and his office, a meeting was called to discuss the issue; Hokinson decided not to have a representative of the DWP attend and the meeting, and plaintiff's conduct was apparently subjected to serious criticism, (5) following that meeting Hokinson reassigned all of plaintiff s cases; (6) Hokinson then initiated an investigation into plaintiff s misconduct and postponed her step pay increase pending the outcome of the investigation; and finally, (7) plaintiff received a proposed termination notice and, when the City refused to make her a financial settlement offer, she quit her job (without responding to the proposed notice of termination).

We do not see how these acts can be characterized as anything but discretionary within the meaning of section 820.2. On their face, each of these acts by Hahn and Hokinson involved personnel decisions involving plaintiff and clearly

come within the ambit of the discretionary immunity statute. In its discussion of section 820.2, one court stated, "
'[g]overnmental immunity for liability for discretionary acts performed by public officers and employees in the exercise of their discretion has long been recognized in this state by judicial interpretation and is based on salutary public policy.' [Citation.] ... "Generally speaking, a discretionary act is one which requires the exercise of judgment or choice. Discretion has also been defined as meaning equitable decision of what is just and proper under the circumstances. [Citation.] It is not, however, possible to set forth a definitive rule which will resolve every case, and other factors must also be considered as, for example, the importance to the public of the function involved.' [¶]... [0]ur Supreme Court [has] explained that '[b]ecause of important policy considerations, the rule has become established that government officials are not personally liable for their discretionary acts within the scope of their authority even though it is alleged that their conduct was malicious. The subjection of officials, the innocent as well as the guilty, to the burden of a trial and to the danger of its outcome would impair their zeal in the performance of their functions, and it is better to leave the injury unredressed than to subject honest officials to the constant dread of retaliation." *(Kemmerer v. County of Fresno, supra,* 200 Cal.App.3d at P. 1437, citations omitted.)

Plaintiff argues that section 820.2 has limited application, at least with respect to statutory causes of action. She relies on the phrase "except as otherwise provided by statute" which is included in section 820.2 as the justification for her contention that any cause of action created or recognized by statute is not subject to the immunity provisions of section 820.2. We disagree.

In *Caldwell v. Montoya, supra,* 10 Cal.4th 972, the court concluded that the phrase "except as otherwise provided by statute" does not mean whenever a statute of general application creates a liability applicable to public employees,

the exception has been satisfied. "Under [that) view, public employees might enjoy discretionary act immunity from common law forms of relief, but they would be stripped of such immunity for all causes of actions created by statute." (Id. at p. 985.) The court held that the immunity provisions of the Tort Claims Act should prevail over general rules of actionable duty and, in doing so, rejected the very argument that plaintiff advances here.

In *Caldwell,* the court explained that "section 820.2 does not grant or withhold its protection on the basis of whether the legal duty ... arose by common law or by statute." *(Caldwell v. Montoya, supra, 10* Cal.4th at p. 986.) The *Caldwell* court also explained that any exception to this immunity was narrow. The immunity of section 820.2 "cannot be abrogated by a statute which simply imposes a general legal duty or liability on persons, including public employees. Such a statute may indeed render the employee liable for his violations unless a specific immunity applies, but it does not remove the immunity. This further effect can only be achieved by a clear indication of legislative intent that statutory *immunity is withheld or withdrawn* in the particular case." *(Id.* at p. 986.)

In *Caldwell,* the court was concerned with the impact on a claim under FEHA and concluded that it contained no indication of a legislative intent to override the immunity provisions in the Tort Claims Act. *Caldwell* made it clear that for a statutory liability to override the immunities of the Tort Claims Act, a plaintiff must show a clear indication, either in the words or the legislative intent of the statute, that liability should prevail over specific immunities provided by the Tort Claims Act. *(Caldwell v. Montoya, supra,* 10 Cal.4th at pp. 984-988.)

An example of such a legislative intent is found in Government Code section 8547 et seq. (the state employee whistleblower statutes). (See *Shoemaker v. Myers* (1992) 2 Cal.App.4th 1407, 1423-1425.) However, none of the statutory

claims asserted here by plaintiff fit in that mold. The FEHA claim clearly must fall to section 820.2. *(Caldwell v. Montoya, supra, 10* Cal.4th at p. 978.) The alleged Ralph Act (Civ. Code, § 51.7) and Bane Act (Civ. Code § 52. 1) violations likewise are subject to the immunity provisions of section 820.2. (See *Gates v. Superior Court, supra,* 32 Cal.App.4th at pp. 512-513.) The same must be said of the alleged Labor Code Whistleblower violation (Lab. Code, § I 1 02.5), as the terms of that statute provide no indication of a legislative intent to override the immunities statute. Moreover, as we have discussed, Hahn was not an "employer" of plaintiff and therefore the statute could not apply to him in any event.

Finally, we are satisfied that the alleged general constitutional violations by Hahn and Hokinson are also subject to the immunity statute. In *Bradley v. Medical Board* (1997) 56 Cal.App.4th 445, 456 which involved a claimed federal due process violation arising from an undercover investigation, the court stated: "The mere assertion, however, of a vague constitutional right to, for instance, due process, will not defeat a qualified immunity defense. Rather, 'the right the official is alleged to have violated must have been "clearly established" in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that *what he is doing* violates that right.' [Citation.]" The *Bradley* court then emphasized that, "When qualified immunity is asserted, we must undertake a two-step analysis: '(1) Was the law *governing the official's conduct* clearly established? (2) Under that law, could a reasonable officer have believed the conduct was lawful?' *(Neely v. Feinstein* (9th Cir. 1995) 50 F.3d 1502, 1507, italics added.)" (Id. at p. 456, fn. omitted.) "A government official is entitled to qualified immunity even where reasonable officers may disagree as to his or her conduct, as long as the conclusion is objectively reasonable. *(Act Up!/Portland v. Bagley* (9th Cir. 1993) 988 F.2d 868, 872.)" *(Id.* at pp. 456-457.)

Applying the two step analysis discussed in *Bradley,* we are satisfied that the law governing Hahn's or Hokinson's conduct was not clearly established; (i.e., that it is not at all clear just what constitutional fight the conduct of Hahn and Hokinson has violated) nor could Hahn and Hokinson have reasonably believed their conduct was unlawful with respect to plaintiff. No reasonable reading of the *facts* alleged in plaintiffs complaint could justify any conclusion other than they were handling a serious breach of discipline within their own office: an obvious personnel matter over which they had the discretion (and the duty) to act. Regulating motions to the Court of Appeals, requiring prior approval of correspondence addressed to the City Attorney and other officials, and denying requests for promotions clearly do not constitute unlawful activity nor could they have reasonably been believed to be unlawful by Hahn and Hokinson. In fact, these are the very managerial day-to-day activities managers and supervisors or deputy city attorneys are expected to engage in to run an office. Plaintiff has not alleged any *facts* which would justify overriding the immunities of Government Code section 820.2. Therefore, Hahn and Hokinson are immune from liability for the alleged violations of plaintiffs constitutional rights.

DISPOSITION

The order of dismissal is affirmed. Hahn and Hokinson shall recover their costs on appeal.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

CROSKEY, Acting P.J.

We Concur:

KITCHING, J.

ALDRICH, J.

Second Appellate District, Division Three, No. B114033
S063586

IN THE SUPREME COURT OF CALIFORNIA

IN BANK

OLGA H. GARAU, Petitioner

v.

LOS ANGELES COUNTY
SUPERIOR COURT, Respondents

JAMES K. HAHN, Real Party In Interest

SUPREME COURT
FILED
SEP 24 1997
Robert Wandruff
Clerk
DEPUTY

Petition for review DENIED.

MOSK

Acting Chief Justice

OFFICE OF THE CLERK
COURT OF APPEAL
STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT
JOSEPH A. LANE, CLERK

DIVISION: 3 DATE: 08/05/97

Law Offices of
Patricia J. Barry
528 Colorado Avenue
Santa Monica, CA. 90401

RE: Garau, Olga H.
VS.
S. c. l. a.
Hahn, James K.
2 Civil B114033
Los Angeles No. BC168531

THE COURT:

The petition for writ of Mandate-Stay is denied.

RUSHFELD, SHELLEY & DRAKE
LINDA C. MILLER, SBN: 94164
12925 RIVERSIDE DRIVE, FOURTH FLOOR
SHERMAN OAKS, CALIFORNIA 91423-2287
Voice: (818) 906-1441 Fax: (818)906-2532

Attorney for Defendant,
JAMES K. HAHN, THOMAS C. HOKINSON,
CITY OF LOS ANGELES

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

OLGA H. GARAU,
Plaintiff,

v.

JAMES K. HAHN, THOMAS C. HOKINSON, CITY OF LOS ANGELES and DOES 1 TO 20, inclusive,
Defendants.

CASE NO. BC168531
ORDER OF DISMISSAL

RECEIVED
JULY 18, 1997
DEPT 17

~~FILED
LOS ANGELES
SUPERIOR COURT
JULY 18 1997
JOHN A. CLARKE,
CLERK
(SIGNATURE)
BY R. BARRISS,
DEPUTY~~

FILED
LOS ANGELES
SUPERIOR COURT
AUG 7 1997
JOHN A. CLARKE,
CLERK
(SIGNATURE)
BY L KLEIN, DEPUTY

The demurrer of defendants JAMES K. HAHN and THOMAS C. HOKINSON came on regularly for hearing on July 14, 1997 before the Honorable Richard Kalustian, Judge presiding. Linda C. Miller appeared on behalf of defendants

and moving parties. Patricia J. Barry appeared on behalf of plaintiff OLGA GARAU.

The court, after reviewing the moving and opposing party papers, and listening to argument of counsel, finds that the demurrer to the entire first amended complaint is sustained without leave to amend as to defendants HAHN and HOKINSON. As to the second, fifth, sixth and sixteenth causes of action, the demurrer is sustained without leave to amend on the grounds that HAHN was not plaintiff's employer.

The demurrer is further sustained without leave to amend on the grounds that plaintiff's allegations against HAHN and HOKINSON arise from discretionary personnel/management related decisions and HAHN and HOKINSON are thus immune from liability pursuant to Government Code §820.2.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the demurrer of defendants JAMES K. HAHN and THOMAS C. HOKINSON be sustained without leave to amend and that defendants HAHN and HOKINSON be dismissed with prejudice from this action.

DATED: 8/7/97

/s/

RICHARD P. KALUSTIAN
Judge of the Superior Court

THE DOCUMENT TO WHICH THIS CERTIFICATE IS ATTACHED IS A FULL, TRUE, AND CORRECT COPY OF THE ORIGINAL ON FILE AND OF RECORD IN MY OFFICE

ATTEST AUG 1 4 1997

JOHN A. CLARKE
Executive Officer/Clerk of the Superior Court of California, County of Los Angeles.

By /s/, Deputy
J.. KREBSBACH

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State Bar No. 059116

Attorney for Plaintiff
OLGA H. GARAU

ORIGINAL FILED

APR 24 1997

LOS ANGELES
SUPERIOR COURT

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

OLGA H. GARAU,	)
	)
Plaintiff,	)
	)
vs.	)
	)
JAMES K. HAHN, THOMAS C. HOKINSON, CITY OF LOS ANGELES, and Does 1 to 20, inclusive,	)
	)
Defendants.	)

CASE NO. BC168531

FIRST AMENDED COMPLAINT FOR COMPENSATORY AND PUNITIVE DAMAGES, DECLARATORY AND INJUNCTIVE RELIEF, ATTORNEY'S FEES, CIVIL PENALTIES, AND COSTS

1. Breach of Statutory Duty (violation of multiple statutes, including Fair Employment and Housing Act, based on gender, ancestry, and national origin discrimination, and retaliation; Equal Pay Act; Bane Act; Ralph Act; Meyers-Milias Brown Act; Labor Code whistleblower statute, etcetera)
2. Anticipatory Breach of Statutory Duty to terminate tenured public employees only for good cause
3. Violations of free speech, substantive and procedural due process, equal protection, anti-discrimination clause, and the right to petition the government, under Article I, Sections 2, 3, 7(a) and 8 of the California Constitution
4. Abuse of official authority in violation of public policy
5. Intentional and Negligent Infliction of Emotional Distress
6. Negligence Per Se
7. Constructive Wrongful Termination in violation of public policy

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I
GENERAL ALLEGATIONS

1. This is a civil action for back pay and front pay, compensatory and punitive damages, injunctive and declaratory relief, attorney's fees and costs, and civil penalties and other just and appropriate relief to redress the deprivation of civil and constitutional rights under Article I, Sections 2, 3, 7(a), and 8 of the California Constitution; under the Fair Employment and Housing Act ("FEHA") for discrimination and harassment based on gender, ancestry, and national origin,

for failure to prevent same, and for retaliation for protesting those unlawful employment practices; for violations of the Bane Act, the Ralph Act, the Meyers-Milias-Brown Act, the state Equal Pay Act, and the Labor Code whistleblower statute; for anticipatory breach of the statutory duty to discipline and terminate tenured public employees only for good cause; for intentional and negligent infliction of emotional distress and negligence per se; and for abuse of official authority and constructive wrongful termination in violation of public policy. As grounds therefor, Plaintiff avers and alleges as follows:

2. Defendant JAMES K. HAHN ("HAHN" or "City Attorney") is, and at all times mentioned, has been the City Attorney for the City of Los Angeles, an elected public official, and a California lawyer.

3. Defendant THOMAS C. HOKINSON ("HOKINSON") is, and at all times pertinent to the claims against him in this lawsuit, has been the Chief Assistant City Attorney for the Legal Division of the Department of Water of the City of Los Angeles. At all times mentioned in this lawsuit he is, and has been a public employee and a California lawyer.

4. At all times mentioned, Defendant CITY OF LOS ANGELES ("CITY") was and is a municipal corporation within the County of Los Angeles, State of California, organized and existing under and by virtue of the Charter of the City of Los Angeles.

5. At all times mentioned, Defendants CITY and HAHN, were Plaintiff's employers in a dual-employment relationship whereby CITY pays Plaintiff's salary and benefits and, jointly with HAHN, negotiates and approves certain terms and conditions of employment set forth in the memorandum of understanding applicable to Plaintiff's employment classification. Defendant CITY has delegated and invested the power to make critical employment decisions such as hiring and firing, lay-off, demotion, and discipline of deputy city attorneys such as Plaintiff, upon the Office and person of City

Attorney HAHN pursuant to Section 42(10) of the Charter of the City of Los Angeles.

6. CITY and HAHN are also the employers of HOKINSON and of all the other Defendants and persons mentioned in this Complaint. At all times mentioned Defendants CITY and HAHN delegated and invested in the other Defendants and persons otherwise named in this Complaint, the power and authority of Defendants CITY and HAHN to act as their agents in their name.

7. At all times mentioned, each and every public official, agent, servant, and employee was an officer, agent, servant, and employee of the others, and at all times here mentioned, each such individual acted or failed to act, or purported to do so, within the course and scope of said public office, service, agency, or employment, and with the express or implied permission and consent of each of the remaining codefendants.

8. Defendants CITY, HOKINSON, and HAHN, respectively as the promulgating body, and as public officials and employees of said entity, are subject to and bound by the City Charter, by the ordinances codified in the Los Angeles Administrative Code, as well as by all the codes, rules, policies, guidelines, regulations, and custom and usage of said CITY, as well as by the laws, statutes and Constitution of the State of California, pursuant to all of which they actually or purportedly acted or failed to act as alleged in this Complaint.

9. Does 1 through 20, inclusive, and each of them, are sued under such fictitious names because their true names and capacities are presently unknown to Plaintiff, who will amend this Complaint to allege their true names and capacities when same are ascertained. Plaintiff is informed and believes and thereon alleges that each of these fictitiously-named defendants is responsible in some manner for the occurrences alleged in this Complaint, and/or is a necessary party to fashion appropriate and complete relief, and that injury and damages as herein alleged were proximately caused by those Defendants.

Whenever and wherever this Complaint mentions defendants CITY, HOKINSON, or HAHN by name, or by general reference to the words "Defendant," "Defendants," or some similar descriptive term, it is referring also to all defendants sued under fictitious names.

10. The unlawful employment practices and all events, acts, and omissions mentioned in this Complaint occurred within the County of Los Angeles, State of California, where all defendants are also known to reside based on information and belief.

11. At all times mentioned, Plaintiff OLGA H. GARAU was and is a competent adult residing in the County of Los Angeles, State of California.

12. Plaintiff is a thirty-seven year old Hispanic female and, to her knowledge, the only Cuban-born employee in the Los Angeles City Attorney's Office at the time of her termination.

13. Plaintiff is also an attorney in good standing, duly licensed to practice law before all courts of the State of California since 1986, the State of Florida since 1989, and the District of Columbia since 1988. She is also a member in good standing of the federal bar, and has practiced before the United States District Court for the Central District of California, the United States Court of Appeals for the Ninth Circuit, and most recently, before the Supreme Court of the United States.

14. Plaintiff was employed as a Deputy City Attorney by Defendants CITY and HAHN for almost eleven years from August 11, 1986 to April 7, 1997. Plaintiff passed her two-year probationary employment period on August 11, 1988, becoming on that date a tenured public employee whose job then became a constitutionally-protected property right that could only be terminated or subjected to suspension without pay or reductions in pay grade only for good cause pursuant to Los Angeles City Charter Section 42(10).

15. During her first three-and-a-half years with the Los Angeles City Attorney's Office, Plaintiff protected CITY

residents against crime as a trial prosecutor in the Criminal Branch, enjoying regular promotions and multiple merit increases. Ongoing since December 4, 1989, when Plaintiff transferred to the Civil Branch, and for over the past seven years, Plaintiff had been working at the Department of Water and Power ("DWP") Legal Division. During her first five-and-a- half years there, she was a plaintiff and defense tort litigator, and a workers' compensation defense and subrogation attorney, collecting and saving substantial amounts of money on behalf of CITY taxpayers and DWP ratepayers. She started defending labor and employment matters two years ago in March of 1995, when she volunteered to assist DWP's Employee Relations Section under the direct supervision of TERSO R. ROSALES ("ROSALES"), a male Filipino Assistant City Attorney who reports to Defendant HOKINSON, a Caucasian male, who in turn reports to HAHN, also a Caucasian male.

16. When Plaintiff officially joined DWP's Employee Relations Section on August 14, 1995, she automatically came under the union representation of the Confidential Attorneys' Bargaining Unit of the Engineers and Architects Association. Different bargaining units of that union also represent DWP employees who on occasion bring grievances and lawsuits against the Department that Plaintiff defended.

17. Plaintiff never actually became a dues-paying member of that union or otherwise participated in it because to do so might give the appearance of impropriety to her client and the public.

18. Plaintiff is informed and believes that her union had no formally designated employee representative at any time pertinent to this lawsuit, and Plaintiff had difficulty even getting a copy of her memorandum of understanding from her employer.

19. On November 16, 1995 Plaintiff complained to her supervisors, ROSALES and HOKINSON, among others,

that the collective bargaining rights of confidential attorneys such as Plaintiff were being compromised in that the union that supposedly represents them is the same one that Plaintiff was opposing and prevailing against in labor and employment matters on behalf of her client, DWP.

20. Plaintiff was then immediately dissuaded and precluded from making a full disclosure of this fact to the client as required by the Rules of Professional Responsibility applicable to all California lawyers because, according to her supervisors, the client might use it as an excuse to hire outside conflict counsel.

21. Plaintiff was instructed to use a paper shredder to destroy drafts of her disclosure containing censored language, and to address her concerns to the City Attorney instead, marking the memo "confidential." Her immediate supervisor ROSALES later acknowledged that he might have been wrong about asking her to shred documents and asking her to mark them "confidential".

22. Plaintiff wrote to the City Attorney on December 4, 1996 concerning this matter, but he never replied, and the meeting with him that Plaintiff's immediate supervisor offered to arrange to discuss the matter never took place.

23. A week later, on December 12, 1995, HOKINSON issued a memo requiring his prior approval, of the content of all correspondence addressed to the City Attorney, DWP officials, the Mayor, City Council members, and other key City officials.

24. Plaintiff is informed and believes that confidential attorneys are still represented by the Engineers and Architects Association, a different bargaining unit of which also represents the management attorneys, whose employee representative is believed to be HOKINSON.

25. On May 3, 1996 Plaintiff confronted her immediate supervisor ROSALES, in writing, with office rumors about a letter of recommendation that he had written, contrary to merit and promotion guidelines, for one of two

female Caucasian attorney in the unit who eventually received not only a promotion but a merit step on top of it, despite having three years less seniority and 1½ years less legal experience than Plaintiff. After avoiding Plaintiff for two weeks, ROSALES admitted to Plaintiff that he had written the letter of recommendation because he wanted to make sure that the female Caucasian attorney in question was promoted "this time." Plaintiff asked ROSALES to write a similar letter for her, but he never agreed to do so.

26. The promotion that Plaintiff requested on March 28, 1996 was denied by HAHN on June 28, 1996, despite Plaintiff's internal appeal of the denial, despite her impressive first-time oral argument to the Ninth Circuit on March 6, 1996 in a possibly landmark case that is yet to be decided,[12] and despite having just saved her client $1.3 million in another factually and legally complex case[13] that was notably omitted from her merit and promotion evaluation by HOKINSON, who had merely recommended Plaintiff for a minimal merit step increase which HAHN approved and awarded on June 28, 1996.

27. No reason was given by HAHN for the denial of Plaintiff's promotion other than the boilerplate, pre-printed excuse given to everyone regarding the limited number of promotional positions available. The only concrete reason that Plaintiff was able to infer from HOKINSON's evasive and annoyed reply to Plaintiff's inquiries was that the cases that Plaintiff was handling were not as significant as those handled by other attorneys. HOKINSON was visibly angered at Plaintiff's inquiries of him on May 31, 1996 as to why her

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[12] *Block v. Dept. of Water and Power*, 9th Cir. Case No. 94-56135.

[13] *Grewal v. Dept. of Water and Power*, LASC Case No. BC 085124, a case currently on appeal, denying claims for payment of accrued overtime by six top managers of the Department of Water and Power which had been the subject of some public controversy and prior press attention.

promotion appeal had been denied, cutting her off in a raised, angry tone of voice, stating, "you know, I really resent this!" when Plaintiff raised the specter of discrimination.

28. On August 23, 1996 the only other female Hispanic attorney at the DWP Legal Division abruptly transferred back to the Criminal Branch, after lasting less than a year in the Employee Relations Section. Plaintiff is informed and believes that she was also denied a promotion in 1996 and was treated differently than the Caucasian attorneys in the unit, something which she complained about to Plaintiff constantly before her departure.

29. On September 19, 1996 a picture frame in Plaintiff's office was damaged and papers disturbed under very unusual circumstances. Plaintiff requested in writing that the occurrence be investigated, but her supervisors failed to do so to Plaintiff's knowledge.

30. On October 15, 1996, Plaintiff complained in writing to City Attorney HAHN, opposing and protesting the disparate treatment to which Plaintiff and the other female Hispanic attorney formerly in the unit had been subjected. The City Attorney replied in a written memo that he was too busy to deal with Plaintiff's concerns and referred her to one of his two Civil Branch Chiefs. To Plaintiff's knowledge, Plaintiff's complaint was not investigated, and no corrective action was taken. In any event Plaintiff has never been so advised or otherwise contacted regarding this topic.

31. And instead of the discrimination, retaliation, and harassment of Plaintiff stopping, as she had requested in her October 15, 1996 memo to HAHN, it continued and became worse.

32. On October 23, 1996, Plaintiff learned that she had been excluded, admittedly so, from telephone conversations with a Ninth Circuit court mediator and opposing counsel in which she had a right to participate as counsel of record on appeal on behalf of her client in a major

appellate case.[14] The person who excluded Plaintiff was the same male Caucasian Assistant City Attorney who tried to exclude and limit her oral argument before the Ninth Circuit on March 6, 1996 in one of the other major federal appellate cases that she was handling.[15]

33. Briefs were due before the Ninth Circuit from DWP and the CITY on October 1, 1996. The male Caucasian Assistant, representing all City Departments except DWP, obtained a thirty-day extension of the briefing schedule on behalf of both DWP and the CITY without Plaintiff's knowledge or consent and then did not even tell her about it. Unaware that she had an extra thirty days to work on the brief, Plaintiff worked frantically to file DWP's opening brief by the due date, even though she was also working on an *amicus* brief due ten days later before the Supreme Court of the United States, which she also managed to timely file in a related case.[16]

34. When Plaintiff complained about the conduct of her co-counsel to the court in a formal written motion filed with the Ninth Circuit Court of Appeals on October 25, 1996 to protect the legal interests of her client against unnecessary additional prejudice and delay of the appeal in question, the male Caucasian Assistant complained to HOKINSON, who immediately ordered Plaintiff to withdraw the motion, with the express authorization and ratification of the City Attorney because, according to HOKINSON, HAHN had been "embarrassed" by Plaintiff's accusation of misconduct on the part of the male Caucasian Assistant.

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[14] *Higuera v. City of Los Angeles and Dept. of Water and Power*, 9th Cir. Case No. 96-55325.

[15] *Block v. Dept. of Water and Power*, 9th Cir. Case No. 94-56135.

[16] *Auer v. Robbins*, U.S. Supreme Court Case No. 95-897, decided February 19, 1997, ___U.S.___, 97 Daily Journal D.A.R. 1673.

35. Plaintiff asked HOKINSON that the client be informed of what was happening, but HOKINSON refused. HOKINSON then further coerced and attempted to intimidate Plaintiff by threatening to reassign the cases in question and forcing Plaintiff to attend a very hostile meeting with four male Caucasian attorneys, including HOKINSON, the male Caucasian Assistant, and their two immediate supervisors, all of them senior to Plaintiff, who managed to reduce her to tears before the end of the meeting, and from which she requested to be excused to leave before it concluded.

36. Prior to the meeting, HOKINSON threatened Plaintiff with HAHN's and his other Civil Branch Chief's attendance at the meeting, but they never actually showed up. HOKINSON also flatly refused Plaintiff's request to have the highest available representative of their client, DWP, who happened to be a minority female, attend the meeting and set forth the client's position.

37. When Plaintiff still refused to withdraw the motion, citing her ethical and statutory obligations to the client, as previously threatened, the four Fair Labor Standards Act ("FLSA") cases previously assigned to her[17] were immediately reassigned and physically removed from her office with a shopping cart by Plaintiff's supervisors HOKINSON and ROSALES in the presence of Plaintiff's secretaries on November 5, 1996.

38. HOKINSON and ROSALES failed and refused to tell Plaintiff whether the male Caucasian Assistant who admittedly excluded her was being disciplined, but Plaintiff is informed and believes that he remains counsel of record on the FLSA cases to the present day. These cases involve multi-million dollar claims for overtime at time-and-a-half by top DWP and CITY managers, professionals, and executives for

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[17] *Block, Higuera, Auer, and Rusk v. Los Angeles Dept. of Water and Power,* U.S.D.C. Case No. CV 92-7316-JGD (Tx), pending in the District Court for the Central District of California.

which CITY taxpayers and DWP ratepayers are being asked to foot the bill.

39. After these FLSA cases were wrongfully taken away from her, Plaintiff was then demoted to handling cases with significantly less- legal complexity and monetary exposure, placing Plaintiff in the humiliating and embarrassing position of having to deflect inquiries from colleagues and coworkers regarding the status of the FLSA cases that she had previously handled with such extraordinary success, and that were taken away from her for no good reason.

40. Since at least October 31, 1996, unlike before, Plaintiff also suffered the additional humiliation and embarrassment of having her legal work closely scrutinized by her supervisors on a regular basis, unlike before, with ROSALES reviewing all of her written work product, constantly monitoring her cases, and even going to court to watch Plaintiff, a seasoned and experienced attorney, appear at a routine status conference on January 10, 1997, and attempting to do the same at an ex parte appearance on February 27, 1997.

41. As recently as early March of 1997, Plaintiff received notices and memoranda regarding several tort cases that she had not been responsible for handling in more than a year. Her complaints about this to the Torts Supervising Attorney were ignored, and when she questioned the Chief Claims Agent for DWP on March 11, 1997 as to why her notes and memos bringing this fact to management's attention were being ignored, he laughed derisively in front of two other claims agents. When she brought the incident to her immediate supervisor's personal attention, whom she had previously copied with her memos, he stated that he assumed that there had been some sort of mistake.

42. Plaintiff was then threatened, harassed, intimidated, and coerced with a baseless, unlawful, and unconstitutional investigation into her conduct, on orders of the City Attorney,

at the apparent instigation of HOKINSON and possibly others, which had been ongoing since November 7, 1997.

43. A week before Christmas 1996, Defendants presented Plaintiff with a voluminous investigation report including as exhibits her writings, threatening discipline inclusive of termination for alleged insubordination and "false" accusations of misconduct against the male Caucasian Assistant City Attorney. One of the purported bases for the insubordination charge is alleged disobedience of the December 12, 1995 memo from HOKINSON censoring all written correspondence to the client and other public officials.

44. After Plaintiff complained in writing of discrimination retaliation and harassment, Defendants tried to force Plaintiff to quit her job and leave their employ by threatening to fire her under an unconstitutionally vague section of the Los Angeles City Charter, pursuant to unconstitutional and outdated procedural rules that have not been amended by the City Attorney's Office in over 21 years.

45. Plaintiff has never been given prior notice of the disciplinary guidelines that she is unfairly accused of having violated, and which do not apply to her in any event since deputy city attorneys are exempt from civil service under Section 111 of the City Charter, and Plaintiff is informed and believes that these are civil service guidelines that have never been adopted by the City Attorney's Office.

46. Despite all these constitutional infirmities in their rules and their processes, which Plaintiff pointed out to Defendants HOKINSON and HAHN a month-and-a-half earlier, on March 21, 1997, after Plaintiff had filed her government claim against CITY, HOKINSON, and HAHN, and her administrative charges of discrimination, retaliation, harassment and other violations of law with the Department of Fair Employment and Housing ("DFEH"), HOKINSON gave Plaintiff written notice that HAHN intended to terminate her employment with the City Attorney's Office.

47. Three additional charges, based upon the same facts alleged in the original November 20, 1996 investigation report, were added to the proposed termination notice, which was made to look more voluminous and intimidating by attaching it to the earlier investigation report. The day that this notice was given to Plaintiff also happened to coincide with the last business day before the date when a response was due from the City on the government tort claim that Plaintiff had filed on February 6, 1997.

48. On March 20, 1997, the day before Plaintiff received the proposed termination notice, Plaintiff had walked into her office to find the Principal Clerk Legal who supervises all DWP Legal Division secretaries, emptying out some of Plaintiff's filing cabinets just outside Plaintiff's office with the expressed intent of giving them to the secretaries. When Plaintiff asserted that she would prefer to keep the cabinets for future case storage, the clerk replied: "But will you be needing them, really?" The clerk then continued to go through Plaintiff's cabinets, humming to herself. The proposed termination notice had been typed by this same clerk, who has also harassed Plaintiff about other matters.

49. Although HOKINSON and HAHN knew that Plaintiff was represented by legal counsel, they did not notify her attorney of the March 21 meeting at which Plaintiff would be told that the City Attorney intended to fire her. Rather, HOKINSON asked one of Plaintiff's secretaries at 11:00 A.M. on the date of the meeting to simply tell Plaintiff that she was expected to meet with HOKINSON at 3:30 P.M. that Friday afternoon. Plaintiff asked her secretary what the stated purpose of the meeting was, but the secretary said that she did not know. Plaintiff then tried calling HOKINSON and his secretary several times to find out the nature of the meeting, but there was no answer. Suspecting that it might be related to the pending investigation against her, Plaintiff got a hold of her attorney during lunch time, who fortunately was available and

able to appear at the meeting, by the end of which Plaintiff became emotionally very distraught.

50. The one-week ultimatum given to Plaintiff, in which to respond to the March 21 proposed termination notice by March 28, passed, but Plaintiff was not fired. Instead, on or about March 25, HOKINSON called Plaintiff's attorney requesting a dollar figure on the global settlement proposal that Plaintiff's counsel had again made at the March 21 meeting in an effort to resolve Plaintiff's employment dispute without having to resort to litigation. A month and-a-half earlier, Plaintiff's attorney had first proposed a negotiated settlement both verbally and by letter dated February 6, 1997 enclosing courtesy copies of the original government claim and DFEH charges, addressed to HAHN, HOKINSON, the Mayor, and the President of the City Council, to which there was no reply.

51. On March 26, 1997, Plaintiff's attorney complied in good faith with HOKINSON's request by reducing such a compromise offer to writing, which Plaintiff delivered to CITY and HAHN through HOKINSON on March 27, and HOKINSON acknowledged by letter dated March 27 as having been conveyed to City Attorney HAHN.

52. On April 1, 1997, not having received any reply or counteroffer on the written settlement offer, which lapsed by its terms the day before, the instant lawsuit was filed based upon the government claim and DFEH charges that Plaintiff had filed against CITY, HAHN, and HOKINSON on February 6, 1997.

53. Unbeknownst to Plaintiff, on March 31, 1997, Deputy City Attorney Lenore Lashley had independently filed a Superior Court lawsuit in the Central District[18] also charging hostile work environment, racial and sexual discrimination and retaliation, and other violations of law against CITY, HAHN, HOKINSON, and other supervisors under their supervision and control at the Civil Liability Division where HOKINSON

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[18] *Lashley v. Fox*, et al. LASC Case No. BC168467.

had previously been assigned. The Department of Fair Employment and Housing had issued Ms. Lashley a right-to-sue letter on January 8, 1997.

54. On April 3, 1997, prior to a pre-scheduled meeting with DWP representatives that afternoon on a case that she was handling, Plaintiff approached ROSALES and HOKINSON about an ethical disclosure regarding her proposed termination and pending lawsuit against the City, City Attorney HAHN, and the Chief of the DWP Legal Division, HOKINSON. Plaintiff had previously inquired of the State Bar regarding her ethical and professional duties as an attorney in this situation, and had been informed by the Bar that the disclosure was indeed required by Rule of Professional Conduct 3-310(B). Despite being informed of this ethical and legal requirement, HOKINSON and ROSALES refused to allow Plaintiff to give the client representatives the required disclosure as attorney of record on the case, or to even meet with them to explain what was happening.

55. On April 3, 1997, as Plaintiff was handing HOKINSON her proposed ethical disclosure to the client, he handed her a memorandum notifying her that her automatic anniversary pay step increase based on work performance, due to go into effect on April 14, 1997, would be delayed pending the outcome of the "pending disciplinary process" against her, despite the fact that HOKINSON had admitted to her attorney in the presence of Plaintiff and her immediate supervisor at the March 21 meeting that Plaintiff's work performance as a lawyer was above question, and despite the fact that Plaintiff's immediate supervisor and other attorneys in the her unit had complimented Plaintiff on March 14 for the excellent result that Plaintiff had obtained in a discrimination and retaliation case on behalf of DWP but that, characteristically, was not reported in the Weekly Report to upper management, and despite the fact that the anniversary pay step advancement in question is automatic and mandatory under the memorandum

of understanding applicable to Plaintiff's employment classification, unless there is an actual finding by the City Attorney that the employee has rendered "less than satisfactory service," which in this case was not made.

56. On April 4, 1997, Plaintiff's counsel received a letter dated April 2, 1997, this time from the City Attorney Personnel Director, who to Plaintiff's knowledge is not a lawyer, rebuffing Plaintiff's counsel's settlement offer as "essentially beside the point" and giving Plaintiff a new deadline in which to respond to the proposed termination, although this lawsuit, doing just that, had just been filed the day before and had been immediately publicized by the press on its own initiative in the official legal newspaper of the City of Los Angeles. The new deadline happened to be April 9, 1997, or exactly the day after the election in which HAHN was re-elected as City Attorney for Los Angeles. Plaintiff did not receive the April 2 letter with which she had been copied by the Personnel Director until Monday, April 7, even though it was sent via Inter-Office Mail, and she had been at work on April 2 and 3.

57. On April 7, 1997, devastated emotionally from the long ordeal of discrimination, harassment, and retaliation constituting a systematic, continuing, and pervasive hostile work environment, and wrongfully precluded by her supervisors from even discharging her sworn duties as an attorney, including that most basic duty to communicate fully and freely with her client, Plaintiff was left with no alternative but to tender her constructive termination/forced resignation notice, which was accepted by the City Attorney Personnel Director per memo dated April 11, 1997, and the language of which HOKINSON attempted to change in the presence of ROSALES. After HOKINSON signed the acknowledgment that he received Plaintiff's constructive termination notice, Plaintiff immediately gathered her belongings and ceased to be employed as a Deputy City Attorney, effective April 7, 1997.

II
EXHAUSTION OF ADMINISTRATIVE REMEDIES

A. COMPLIANCE WITH THE GOVERNMENT TORT CLAIMS ACT

58. On February 6, 1997 Plaintiff filed, pursuant to Government Code Section 945.4, a timely, formal claim for damages with the Office of the City Clerk of the City of Los Angeles against Defendant CITY, also naming HAHN and HOKINSON as primary wrongdoers.

59. Plaintiff's government claim was deemed denied by operation of law on March 23, 1997 since Defendants did not reply within the time provided by Government Code Section 912.4.

60. On April 17, 1997, Plaintiff filed, pursuant to Government Code Section 945.4, a timely supplemental claim for damages regarding the constructive wrongful termination occurring on April 7, 1997 as alleged in the last cause of action of this Complaint and in pertinent revisions to other causes of action herein based upon it. The supplemental claim was filed with the Office of the City Clerk against Defendant CITY, again naming HAHN and HOKINSON, and was assigned the same claim number as the original claim, C 97 0562.

61. If necessary, Plaintiff will seek leave to amend this Complaint to allege the disposition of the supplemental claim, if any.

B. RIGHT TO SUE LETTERS ISSUED BY THE STATE DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING

62. On February 6, 1997, Plaintiff also filed with the Department of Fair Employment and Housing of the State of California (DFEH) timely administrative charges of discrimination, retaliation, and harassment, alleging various particulars and other violations of law, against Defendants CITY, HAHN, and HOKINSON.

63. On February 18, 1997, DFEH issued Plaintiff separate right-to-sue letters against each such Defendant, both as to the entity and as to each individual.

64. On April 17, 1997 Plaintiff filed three supplemental DFEH charges against the same three defendants, which were assigned the same case numbers as the original charges: E9697B1312-00-c against CITY, E9697B1312-01-c against HAHN, and E9697B1312-02-c against HOKINSON.

65. Plaintiff will seek leave to amend this Complaint to allege the issuance of additional right-to-sue letters on those supplemental charges, which were promised by the District Administrator to be issued as a matter of course before May 1, 1997.

66. Plaintiff has therefore exhausted all of the administrative remedies that she is legally required to exhaust before filing this lawsuit and First Amended Complaint.

III
SUBSTANTIVE CAUSES OF ACTION

67. By its own acts and omissions and those of its public officers and employees, Defendants CITY, HAHN, HOKINSON have, among other things, wrongfully and unlawfully committed the following torts, breaches of statutory duty, and violations of public policy and of the State Constitution, as a proximate result of each of which Plaintiff has been injured, damaged, and prejudiced as alleged below.

68. To avoid unnecessary repetition, for each cause of action stated below, Plaintiff incorporates by reference each and every pertinent allegation contained in paragraphs 1-57 of the General Allegations above, and each and every applicable allegation of the Damages and Relief Allegations contained in paragraphs 140-155 below, as though set forth in full within each cause of action.

FIRST CAUSE OF ACTION

Against All Defendants for

BREACH OF STATUTORY DUTY IMPOSED BY THE CALIFORNIA FAIR EMPLOYMENT AND HOUSING ACT ("FEHA")

69. Sections 12940 (a) and (h) of California's Fair Employment and Housing Act ("FEHA") prohibit discrimination, harassment, retaliation, and discharge of employees such as Plaintiff by employers and supervisors such as Defendants CITY, HAHN, & HOKINSON, based on such impermissible criteria as gender, ancestry, or national origin. Section 12940(h) of FEHA also requires employers to take all reasonable steps to prevent harassment from occurring even in the absence of tangible loss of job benefits. Section 12940(f) categorically prohibits any form of retaliation by any person or employer against an employee who has opposed unlawful employment practices forbidden by the Act.

70. Plaintiff is a member of several protected classes, namely, she is a Cuban-born Hispanic woman, who additionally engaged in protected conduct under FEHA by protesting and opposing unlawful employment practices in her written complaint to her employer, and to a court of law in order to protect the interests of her client which were also being prejudiced and compromised as a result of the unlawful discrimination being perpetrated against her.

71. Defendants also owed Plaintiff an affirmative statutory duty imposed by their very own ordinances, codified at Sections 4.400 et seq. of the Administrative Code of the City of Los Angeles, and also embodied in numerous policies and guidelines of Defendant CITY that unfortunately Defendants have failed and refused to implement, and requiring, among other things, as follows:

(a) that all CITY Departments, officials, and employees comply with CITY policies and directives to ensure a work environment free of discrimination, harassment, and retaliation;

(b) that all employment and personnel decisions concerning CITY employees, including without limitation, as pertinent here--assignment, training, promotion, and discipline including discharge--be based on work-related merit system principles.

(c) that none of the Defendants, nor their agents, servants, or employees would subject Plaintiff to discrimination, harassment, or discharge on the basis of her gender, ancestry, or national origin among others, and that Defendants would not permit retaliation by anyone due to an employee's report, complaint, or opposition to such unlawful employment practices.

(d) that Defendants would immediately investigate any direct complaint or other information that unlawful discrimination, harassment, or retaliation had occurred or was occurring, and that they would take prompt, meaningful, and effective disciplinary or other appropriate corrective action to punish noncompliance by any City employee, including supervisors and senior management.

72. Plaintiff is informed and believes, and thereon alleges, that throughout the course of her employment with Defendants, particularly evident from the time that she joined the DWP Legal Division, there has existed and continues to exist an actual, ongoing, systematic, and pervasive pattern, policy, and practice of discrimination, harassment, and discrimination against minority women that continues to this day, and of ignoring and retaliating against complaints of gender, ancestry, and national origin discrimination among others, which thereby have, on a continuing basis, fostered and encouraged further discrimination, harassment, and retaliation of employees such as Plaintiff.

73. These unlawful employment practices by Plaintiff's employers, supervisors and other public employees were actually and constructively known to Defendants, who expressly and impliedly ratified, authorized and affirmed them by retaining the perpetrators without reprimand, censure, or

discipline, thereby allowing and encouraging them to continue to engage in prohibited and unlawful employment practices with impunity.

74. Examples of the many acts and omissions evidencing this continuing, pervasive, and systemic pattern of discrimination, harassment, and retaliation based on Plaintiff's gender, ancestry, national origin, and opposition to unlawful employment practices include, but are not limited to the following:

(a) Denial of promotion in 1990 when she was pregnant with her first child, and in 1996, when she only received a minimal merit step increase, despite documented high ability and achievement, and considerably more seniority than a Caucasian female in her unit who received both a merit step and a promotion.

(b) Denial of transfer opportunities that were awarded to Caucasian males with less seniority, one of which coincided with her second pregnancy in 1993.

(c) Case overloading and assignment of undesirable, problematic cases that Caucasian attorneys did not want.

(d) Since joining the Employee Relations Section, delay and denial of training—both substantive and managerial—afforded to Caucasian attorneys, contrary to the City's own guidelines requiring them to be afforded equally to all employees.

(e) Since joining the Employee Relations Section, withholding and minimizing of recognition, back-up, and support in order to benefit other Caucasian attorneys whose accomplishments are exaggerated for promotion and advancement purposes.

(f) Since joining the Employee Relations Section, ongoing ostracism and exclusion from meetings, decisions, and discussions held with other Caucasian attorneys regarding work matters.

(g) Attempts by a Caucasian male Assistant City Attorney, to preclude Plaintiff from equal time at oral

argument, who initially did not want to let Plaintiff argue at all in a major appellate case in which Plaintiff had both the right and the duty to do so as attorney of record on appeal for her client, DWP. Plaintiff's verbal complaints of discrimination to her immediate supervisor, ROSALES, on March 5, 1996 regarding this incident were deflected and ignored.

(h) Admitted exclusion by the same male Caucasian attorney from legal proceedings before a court mediator on another major appellate case in which Plaintiff also had the right and the duty to participate on behalf of her client.

(i) Blatantly retaliating against Plaintiff for exercising her legally-protected right to complain about discrimination, harassment, and other unlawful conduct, by denying her a well-deserved promotion on June 28, 1996, threatening to fire her since December 17, 1996, and constructively terminating her employment on April 7, 1997.

(j) Since November 7, 1996, wrongful accusations of misconduct and relentless harassment against Plaintiff, for opposing discrimination in her October 15, 1996 memo to HAHN, and subsequent attempts to fire her under substantive disciplinary rules that violated Plaintiff's statutory and constitutional rights as alleged in this Complaint.

(k) Failure to prevent discrimination, harassment, and retaliation, and to take corrective action against these unlawful employment practices, thereby condoning and encouraging them, setting a bad example for others to do the same.

(l) Ignoring all of Plaintiff's complaints, and failing to even investigate them.

(m) Creating, allowing to exist, maintaining, and subjecting Plaintiff to a discriminatory, offensive, and hostile work environment that is long-standing, prevalent, and systemic in the Los Angeles City Attorney's Office, and in the DWP Legal Division in particular where all section supervisors have traditionally been male and/or Caucasian, that is, not females belonging to a minority racial or ethnic group.

75. By their wrongful acts and omissions and unlawful employment practices alleged above, Defendants have unlawfully discriminated, harassed, retaliated, and constructively discharged Plaintiff in violation of FEHA, as a proximate result of which she has been injured and damaged as described below.

SECOND CAUSE OF ACTION

Against Defendants CITY and HAHN for

BREACH OF STATUTORY DUTY IMPOSED BY THE CALIFORNIA EQUAL PAY ACT

76. Labor Code Section 1197.5 imposes an affirmative statutory duty upon Defendants CITY and HAHN to pay employees of opposite sexes equal rates of pay for equal work on jobs requiring equal skill, effort, and responsibility, performed under similar working conditions, except pursuant to a seniority or merit system, a system which measures earnings by quantity or quality of production, or a differential based on any bona fide factor other than sex.

77. At all times mentioned here, Defendants CITY and HAHN pretended and purported to have in place a merit system for promotion and advancement within the Office of the City Attorney, also mandated by Section 4.400 et seq. of the Los Angeles Administrative Code, which they nevertheless failed and refused to consistently or fairly enforce, arbitrarily and capriciously awarding promotions and merit pay step increases, instead, according to statutorily prohibited criteria including sex.

78. Plaintiff is informed and believes and thereon alleges that male attorneys in the Office of the City Attorney with less seniority, competency, and experience than her, in positions of comparable or lesser responsibility, are being paid more money and being advanced and promoted more rapidly than she was for no apparent reason other than their sex, as a proximate result of which Plaintiff has been injured and damaged as alleged below.

THIRD CAUSE OF ACTION

Against All Defendants for

BREACH OF STATUTORY DUTY IMPOSED BY THE BANE ACT

79. Defendants also owe an affirmative duty imposed by the Bane Act, at Section 52.1 of the California Civil Code, to protect employees such as Plaintiff from interference or attempted interference with the exercise and enjoyment of her constitutionally and statutorily protected civil rights because of her sex, ancestry, national origin, and/or position in a labor dispute among other prohibited reasons.

80. Defendants HAHN and HOKINSON have used threats, intimidation, and coercion as alleged above to interfere with and attempt to interfere with the exercise and enjoyment of Plaintiff's civil rights as guaranteed by the constitutional and statutory sections alleged elsewhere in this Complaint, and this interference and attempted interference was due to Plaintiff's sex, ancestry, national origin, and/or position in a labor dispute, thereby entitling her to bring an action for damages and injunctive relief as set forth in Civil Code Section 52.

81. Defendant CITY has itself violated the Bane Act by its failure to act and to have checks and balances in place to protect Plaintiff from the continuing violations of that Civil Code section by Defendants HAHN and HOKINSON, particularly after the filing of Plaintiff's government claim putting Defendant CITY formally on notice, which Defendant CITY nevertheless chose to ignore.

FOURTH CAUSE OF ACTION

Against All Defendants for

BREACH OF STATUTORY DUTY IMPOSED BY THE RALPH ACT

82. Defendants also owed Plaintiff a statutory duty to protect her and her property from violence motivated by bias

based on sex, ancestry, national origin, or position in a labor dispute.

83. By damaging or allowing Plaintiff's property to be damaged, and particularly by failing to investigate the occurrence alleged in Paragraph 29 of this Complaint, Defendants CITY, HOKINSON, and HAHN denied, aided, incited, and/or conspired in the denial of Plaintiff's right to be free from violence or threatened violence as guaranteed by Section 51.7 of the California Civil Code, the Ralph Act.

84. Said acts or omissions of Defendants were motivated by Plaintiff's sex, ancestry, national original, and/or positions taken by Plainriff in her labor dispute with Defendants, in violation of Plaintiff's rights under the Ralph Act, as a proximate result of which she was injured and damaged as alleged below.

FIFTH CAUSE OF ACTION

Against Defendants CITY and HAHN for

BREACH OF STATUTORY DUTY IMPOSED BY THE LABOR CODE WHISTLEBLOWER STATUTE

85. Section 1102.5 of the Labor Code prohibits employers such as Defendants HAHN and CITY from making, adopting, or enforcing any rule, regulation, or policy preventing an employee such as Plaintiff from disclosing information to a government agency, which she has reasonable cause to believe reveals a violation of state or federal statutes or regulations. This section also prohibits retaliation against an employee for making such a disclosure.

86. Section 1104 of the Labor Code further makes employers responsible for the acts of their managers, officers, agents, and employees in violation of Section 1102.5.

87. In complaining to the Ninth Circuit Court of Appeals about how a male Caucasian attorney in her office wrongfully excluded her from legal proceedings in which she had a right to participate, Plaintiff was in effect "blowing the whistle" and disclosing a violation of FEHA to a federal appellate court,

which is a government agency, which in this case was the government agency with the most immediate power to remedy the wrong being perpetrated against her client.

88. By threatening, and attempting to intimidate and coerce Plaintiff into withdrawing, in essence, her complaint to that government agency, and later retaliating against Plaintiff for refusing to do so, Defendants violated the Labor Code whistleblower statute.

89. Similarly, HOKINSON's December 12, 1995 memo adopted an ongoing rule, regulation or policy, which was in fact implemented by HOKINSON on November 7, 1997, preventing employees such as Plaintiff from disclosing possible violations of law to government agencies since the memo censored all written communications to various government officials as alleged elsewhere in this Complaint, and therefore also violated the Labor Code whistleblower statute.

90. Additionally, the March 21, 1997 notice of proposed termination violated the Labor Code whistleblower statute in that it came after Plaintiff filed her administratives charge of discrimination, harassment, and retaliation with the Department of Fair Employment and Housing, an outside State agency.

91. Pursuant to Section 1105 of the Labor Code, Defendants CITY and HAHN are therefore each liable to Plaintiff for the injuries and damages proximately suffered by her thereby as a result of their and HOKINSON's violations of the Labor Code whistle-blower statute.

SIXTH CAUSE OF ACTION

Against Defendants CITY and HAHN for

BREACH OF STATUTORY DUTY IMPOSED BY THE MEYERS-MILIAS BROWN ACT

92. California Government Code Section 3506 prohibits public employers such as CITY and HAHN from interfering with, intimidating, restraining, coercing, or discriminating

against public employees such as Plaintiff because of their exercise of rights under Section 3502 of the Meyers-Milias-Brown Act, which guarantees their right to form, join, and participate in a union of their own choosing for the purpose collective bargaining.

93. By their wrongful acts and omissions alleged in this Complaint, including without limitation paragraphs 16-27, above, Defendants violated the rights of Plaintiff and other attorneys in the Confidential Attorneys Unit in violation of the Meyers-Milias-Brown Act, as a proximate result of which Plaintiff was also retaliated against by Defendants' denial of her promotion and other acts alleged in this Complaint, as a proximate result of which she was injured and damaged as set forth below.

SEVENTH CAUSE OF ACTION

Against Defendants CITY and HAHN for

ANTICIPATORY BREACH OF THE STATUTORY DUTY TO DISCIPLINE AND TERMINATE TENURED PUBLIC EMPLOYEES ONLY FOR GOOD CAUSE

94. Pursuant to Section 42(10)(b) of the Charter of the City of Los Angeles, Defendants CITY and HAHN owed a duty to Plaintiff, as a tenured public employee, not to discipline or terminate her without good cause.

95. Although the duty is imposed by statute, it is contractual in nature, since it represents the benefit of Plaintiff's bargain in having passed a two-year probationary period of employment based upon satisfactory performance, and is therefore the public sector equivalent of a private sector contract negating at-will employment.

96. By their threats to fire Plaintiff and other wrongful acts and omissions alleged in this Complaint, including without limitation those contained in the constitutional causes of action below, Defendants have anticipatorily breached said duty to Plaintiff, and proximately thereby caused her injury and damage, as alleged below.

EIGHTH CAUSE OF ACTION

Against All Defendants for

INFRINGEMENT OF FREE SPEECH IN VIOLATION OF ARTICLE I, § 2 OF THE CALIFORNIA CONSTITUTION

97. Plaintiff enjoys a constitutionally-protected right to freedom of speech under Article I, Section 2 of the California Constitution.

98. Defendants CITY, HAHN, and HOKINSON, as a public entity, public official, and public employee respectively, infringed upon this constitutional right of Plaintiff, a public employee, by censoring her written language contained in a formal motion to the Ninth Circuit Court of Appeals, precisely because it exposed misconduct by another public employee who later admitted it, to the detriment of Plaintiff's client who are the ratepayers of the Department of Water and Power.

99. The infringement occurred first when Defendants HOKINSON and HAHN asked Plaintiff to withdraw her motion, and repeatedly later when they caused the motion to be withdrawn by Plaintiff's immediate supervisor; when they took away all of her FLSA cases, not just the one in which the motion was filed; and continuously through the ensuing investigation and threatened termination when Plaintiff asserted both her rights as a person and her duties as an attorney.

100. HOKINSON's December 12, 1995 memo in particular was, is, and continues to be, an unconstitutional and overbroad prior restraint of speech in violation of the rights of Plaintiff and of every other employee to whom it was addressed, in that it censors the content of all written correspondence to the City Attorney, the Mayor, the City Council, and, paradoxically, the Client, to whom Plaintiff and Defendants HAHN and HOKINSON also owe a professional and ethical duty of full and complete disclosure and

communication pursuant to the Business and Professions Code and the Rules of Professional Responsibility applicable to all California lawyers.

101. Defendants additionally violated Plaintiff's free speech rights by refusing to allow her to give a compelled ethical disclosure to her client on April 3, 1997, as a proximate result of all of which she has been injured and damaged as alleged below.

NINTH CAUSE OF ACTION

Against All Defendants for

INFRINGEMENT OF THE RIGHT TO PETITION THE GOVERNMENT FOR THE REDRESS OF GRIEVANCES IN VIOLATION OF ARTICLE I, § 3 OF THE CALIFORNIA CONSTITUTION

102. Plaintiff also has a constitutional right under Article I, Section 3 of the California Constitution, to petition the government for the redress of grievances.

103. All persons and entities with whom Plaintiff communicated or attempted to communicate, and because of which Defendants HAHN, HOKINSON and CITY intended to fire her, are or were officials, representatives, agencies, or subdivisions of the local, state, or federal government of this country.

104. By their wrongful acts or omissions mentioned in this Complaint, Defendants HAHN, and HOKINSON, as a public entity, public official, and public employee respectively, infringed upon this constitutional right of Plaintiff when they threatened, restrained, intimidated, interfered with, coerced, infringed, and retaliated upon Plaintiff's constitutional right as a person and legal duty as an attorney to communicate with the aforesaid members of local, state, and federal government in her attempts to redress grievances for wrongs committed against herself and her client.

105. As with the Bane Act and the Ralph Act, Defendant CITY has itself violated this constitutional right of Plaintiff by its failure to adopt checks and balances to protect Plaintiff from the continuing violation of this constitutional right of Plaintiff by Defendants HAHN and HOKINSON, particularly after the filing of Plaintiff's government claim putting Defendant City formally on notice, which it ignored.

TENTH CAUSE OF ACTION
Against All Defendants for
VIOLATION OF SUBSTANTIVE AND PROCEDURAL DUE PROCESS CLAUSE OF ARTICLE I, § 7(a) OF THE CALIFORNIA CONSTITUTION

106. No person may be deprived by the government of life, liberty, or property without substantive or procedural due process of law under Article I, Section 7(a) of the California Constitution.

107. Plaintiff enjoyed a constitutionally-protected property interest in her job as a tenured Deputy City Attorney, as well as a constitutionally-protected liberty interest in her professional reputation as a lawyer, which includes her name, honor, and integrity being impugned by Defendants and each of them, both of which are essential to her livelihood and the continued support of herself and her young family.

108. Defendants CITY, HAHN, and HOKINSON, as a public entity, public official, and public employee respectively, violated this constitutionally-protected right of Plaintiff when they, among other things:

(a) Retaliated against Plaintiff after she engaged in legally-protected conduct as alleged in this Complaint.

(b) Investigated and threatened to fire Plaintiff under outdated and unconstitutional procedures for violations of substantive rules that Defendants had never given Plaintiff prior notice that they would regulate her conduct, and which rules in fact did not and could not apply to or regulate her

conduct since they are civil service rules that Plaintiff is informed and believes have never been adopted by the City Attorney's Office as required by City Charter 42, since all attorney personnel in the City Attorney's Office is, expressly because of its professional nature and duties, exempt from the classified civil service and its rules by Section 111 of the City Charter.

(c) Adopted, enacted, and attempted to enforce the unconstituional disciplinary portion of said City Charter Section 42, which does not define the meaning of "good cause" and does not refer or incorporate by reference the civil service disciplinary rules under which Defendants and each of them are attempting to discipline Plaintiff, or any other substantive rules of conduct for that matter, therefore providing a process without any substance.

(d) Excessively disciplined Plaintiff by attempting to fire her without good cause, solely for the non-job related, improper and ulterior motives of depriving her of tangible economic job benefits about to accrue as alleged in Paragraph 55 of this Complaint, eliminating her from the workplace where she might educate other employees with similar claims, and ultimately, to cover up their own wrongdoing and at the same time create a bogus defense to this lawsuit.

(e) Failing to adopt and implement progressive discipline guidelines applicable to civil-service exempt attorney personnel.

109. As lawyers, and as the authors and implementers of their own rules, Defendants and each of them, knew or should have known about these due process shortcomings, even before Plaintiff called them to their attention, and nevertheless proceeded and continue to proceed despite these constitutional infirmities in their substantive and procedural rules and processes.

ELEVENTH CAUSE OF ACTION

Against All Defendants for

DENIAL OF EQUAL PROTECTION OF THE LAWS IN VIOLATION OF ARTICLE I, § 7(a) OF THE CALIFORNIA CONSTITUTION

110. No person may be deprived by the government of equal protection of the laws under Article I, Section 7(a) of the California Constitution.

111. Plaintiff is a member of several legally-suspect classifications, namely she is a female of Cuban national origin who has stood up for her legal rights.

112. Defendants, CITY, HAHN, and HOKINSON, and each of them, as a public entity, public official, and public employee respectively, violated, this constitutional right of Plaintiff when they discriminated, harassed, and retaliated against Plaintiff after she expressed legitimate concerns and engaged in legally-protected conduct, contrary to the various statutes, constitutional sections, and public policies as alleged in this Complaint.

113. Defendants also denied Plaintiff the equal protection of the laws by their discriminatory and retaliatory enforcement of City ordinances, guidelines, policies, and the CITY Charter itself, particularly as it pertains to employee discipline, which is also specifically prohibited by Section 4.400, et seq. of the Los Angeles Administrative Code.

114. The acts and omissions of Defendants and each of them in denying Plaintiff the equal protection of the laws as alleged in this Complaint, were unconstitutionally taken against Plaintiff on the basis of her gender, ancestry, and national origin, and the positions that she has taken concerning her legal rights.

TWELFTH CAUSE OF ACTION

Against All Defendants for

VIOLATION OF THE ANTI-DISCRIMINATION CLAUSE OF ARTICLE I, § 8 OF THE CALIFORNIA CONSTITUTION

115. Under Article I, Section 8 of the California Constitution, no person may be disqualified from pursuing a profession or employment because of sex, or national or ethnic origin, among other suspect criteria.

116. Plaintiff is a member of several legally-suspect classifications, namely she is a female of Hispanic ancestry and Cuban origin.

117. Defendants, CITY, HAHN, and HOKINSON, and each of them, as a public entity, public official, and public employee respectively, violated this constitutional right of Plaintiff when they attempted, and succeeded, in forcing Plaintiff out of her job in the public sector, as a proximate result of which she has been injured and damaged as alleged below.

118. Plaintiff is also informed and believes, based upon Defendants' own records reluctantly provided to Plaintiff by the City Attorney Personnel Director, pursuant to a public records request, that Hispanic females, among others, have been and continue to be systematically excluded from the upper management ranks of the Los Angeles City Attorney's Office, despite the growing prevalence of that minority group in the City of Los Angeles, in that there are no female Hispanic attorneys in positions above Deputy City Attorney IV; that is, there are no female Hispanic at or above the Assistant City Attorney level, even though there are talented, hard-working female Hispanic lawyers such as Plaintiff single-handedly performing extremely difficult and complex Assistant-level work, before the Supreme Court of the United States no less, without any type of acknowledgment, recognition, or reward whatsoever, let alone hard-earned promotion or advancement into the upper ranks of the Los Angeles City Attorney's Office.

THIRTEENTH CAUSE OF ACTION

Against All Defendants for

ABUSE OF OFFICIAL AUTHORITY IN VIOLATION OF PUBLIC POLICY

119. There is a strong public policy in California against the pattern of conduct undertaken by Defendants CITY, HAHN, and HOKINSON, up to the time of the filing of this lawsuit, embodied in each and every one of the statutes and constitutional sections alleged to have been violated elsewhere in this Complaint, as well as in the ordinances and codes of Defendant CITY.

120. By their own acts and omissions short of constructive termination, and those of other public employees under their direction, supervision, and control, Defendants HAHN and HOKINSON, have abused the official authority with which they are invested by Defendant CITY, in violation of the public policy of this State, and of Defendant CITY.

121. Defendant CITY has also abused official authority invested in it by its constituents, in violation of the same public policies, by failing to have meaningful and effective checks and balances against such abuses of authority perpetrated against employees such as Plaintiff by public officials and employees such as Defendants HAHN and HOKINSON as alleged elsewhere in this Complaint.

FOURTEENTH CAUSE OF ACTION

Against All Defendants for

INTENTIONAL AND NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS

122. At all times pertinent to this Complaint, Defendants HAHN and HOKINSON, as individual private persons, owed Plaintiff a common law duty not to intentionally or negligently inflict emotional distress upon her.

123. Defendants HAHN and CITY are also derivatively liable as dual employers for the common law torts of its employees under the doctrine of respondeat superior.

124. Defendants and each of them were or should have been aware of the emotional distress that they would and actually did and continue to cause Plaintiff by doing or failing to do the acts alleged in this Complaint, particularly after she informed them of her physical and emotional distress on October 15, 1996 in a written memo to HAHN, in at least two conversations with HOKINSON in October of 1996, and in her formal government claim filed with Defendant CITY on February 6, 1997. Nevertheless, Defendants and each of them, repeatedly failed and refused to acknowledge Plaintiff's complaints or to cease and desist from their unlawful employment practices and other wrongful conduct.

125. As a direct and proximate result of such acts and omissions, Plaintiff did in fact continuously suffered ongoing and severe physical and emotional distress from being forced, as a condition of continued employment, to endure the hostile work environment described in this Complaint, particularly after undergoing continuing harassment and retaliation for complaining about it.

126. As a further proximate result of the constructive, wrongful termination of Plaintiff's employment by Defendants CITY and HAHN, and the circumstances under which she was forced to resign, Plaintiff did in fact suffer and continues to suffer ongoing and severe physical and emotional distress, humiliation, embarrassment, and mental anguish which is expected to continue and become worse in the future, from the stigma of the threatened firing, and of being unemployed, unemployable, and unable to support herself and her family as before.

127. Defendants' acts and omissions were intentional and malicious and done for the purpose of causing Plaintiff to suffer humiliation, mental anguish, and severe emotional and physical distress of such substantial quantity and enduring quality that no reasonable person in a civilized society could be expected to endure it. And, in fact, the only other female Hispanic attorney in Plaintiff's work unit left that work

environment in late August of 1996.

128. Additionally, Defendants' acts and omissions in proximately causing the above-described emotional distress to Plaintiff, were also negligent, reckless, and in any event unlawful, for which all such Defendants are liable.

FIFTEENTH CAUSE OF ACTION

Against All Defendants for

NEGLIGENCE PER SE

129. Defendants CITY, HAHN, and HOKINSON, also owe a duty to Plaintiff to properly and effectively train, evaluate, supervise, investigate, discipline, and retain its employees and subordinates, including Plaintiff, according to merit principles, and free of discrimination, harassment, and retaliation, as required by the letter and the spirit of City ordinances codified in Sections 4.400 et seq. of the Los Angeles Administrative Code, referred to in the First Cause of Action above.

130. At all times mentioned, Plaintiff was an employee within the class of persons whom that statute and others alleged in this Complaint sought to protect, and for whose protection these statutes were adopted and enacted.

131. The injuries and damages set forth below and proximately caused by Defendants' violation of those statutes are precisely of the type sought to be prevented and redressed by those statutes.

132. By their wrongful acts and omissions as set forth in this Complaint Defendants, CITY, HAHN, and HOKINSON, and each of them, so negligently trained, evaluated, supervised, investigated, disciplined, and retained certain of its public officers and employees, and so negligently evaluated, supervised, investigated, and attempted to discipline Plaintiff, as to proximately thereby cause injury and damage to her as alleged below.

133. Defendants HAHN and CITY had actual or constructive knowledge of prior discrimination, harassment,

retaliation, or other wrongful, reckless, and negligent conduct by certain of its officers, servants, agents, and employees, and despite such knowledge of their unfitness and propensity to wrongful and unlawful conduct, nevertheless continued to employ such individuals in positions of authority and power, where they could and did abuse it, thereby authorizing and ratifying their wrongful and unlawful conduct.

134. As a proximate result of Defendants' negligent training, evaluation, supervision, investigation, discipline, retention, and of their failure to censure, reprimand, or discipline offending employees and supervisors, Plaintiff was injured and damaged as set forth below.

SIXTEENTH CAUSE OF ACTION

Against Defendants CITY and HAHN for

CONSTRUCTIVE WRONGFUL TERMINATION IN VIOLATION OF PUBLIC POLICY

135. There is in the State of California a strong public policy against discrimination on the basis of gender, ancestry, and national origin among others, embodied in Article I, Sections 7(a) and 8 of the California Constitution, Section 12920 of the California Fair Employment and Housing Act, and case law interpreting them.

136. There is also in California, a strong public policy encouraging the revelation of wrongdoing in public affairs and in protecting whistleblowers against retaliation for such disclosures. This public policy is acknowledged by whistleblower statutes such as Labor Code Section 1102.5 and Section 12940(f) of FEHA.

137. Additionally, the Bane Act and the Ralph Act also evidence a strong public policy that the constitutional and statutory rights of Californians not be trampled upon, either actually or by way of attempt, as a result of a person's sex, ancestry, national origin, or position in a labor dispute.

138. California also recognizes, in Section 6068 of the Business and Professions Code and Rule of Professional

Conduct 3-310(B) that it is of fundamental public importance that lawyers represent their clients zealously, communicate fully and freely with them, and obey the professional rules of ethical conduct and the State Bar Act.

139. By attempting and threatening to fire Plaintiff, and by their other acts and omissions alleged elsewhere in this Complaint, Defendants CITY and HAHN deliberately created, knowingly permitted to exist, and failed to remedy in Plaintiff's workplace a hostile work environment and working conditions so intolerable and aggravated as to force a reasonable employee in Plaintiff's position to resign, particularly when, by their acts and omissions, Defendants HAHN and HOKINSON actually precluded Plaintiff, an attorney, from discharging her professional and ethical duty to communicate with her client, thereby constructively and wrongfully terminating her employment as a Deputy City Attorney in violation of the various above-stated fundamental public policies of this State, as a proximate result of which Plaintiff has been injured and damaged as alleged in this Complaint.

IV
DAMAGES AND REMEDIES ALLEGATIONS
COMPENSATORY DAMAGES FOR EMOTIONAL DISTRESS

140. As a direct and proximate result of the above-mentioned wrongful acts and omissions of Defendants, Plaintiff was hurt and injured in her health, strength, and activity, sustaining injury to her body and shock and injury to her nervous system and person, all of which said injuries have caused, and continue to cause Plaintiff great mental, physical, and psychological injury and pain and suffering, including without limitation, severe emotional distress, mental anguish, humiliation, embarrassment, depression, and anxiety. Plaintiff is informed and believes, and thereon alleges, that said injuries

will result in permanent disabilities to her, all to her general damages in an amount according to proof at trial.

MEDICAL AND RELATED EXPENSES

141. As a further, proximate result of said wrongful acts and omissions of Defendants, and each of them, Plaintiff was required to, and did employ physicians and other medical and related personnel to examine, treat, and care for her, and did incur medical and related expenses in an amount to be established according to proof at trial. Plaintiff is informed and believes and thereon alleges that there will be additional medical expenses, due to the continuing nature of the wrongs and of her injuries and disabilities, all in an amount to be established according to proof at the time of trial.

LOSS OF EARNINGS, EARNING CAPACITY, AND BENEFITS

142. As a further, proximate result of the above-mentioned wrongful acts and omissions of Defendants, and each of them, Plaintiff lost earnings, promotions, and related benefits, and additionally has been prevented from attending to her usual occupation as a Deputy City Attorney and profession as an attorney, and was injured in such a way as to diminish her capacity for earnings and compensation, all of which is anticipated to continue into the future, and as a result of which Plaintiff has sustained, and will continue to incur damages for loss of earnings including but not limited to back pay and front pay; loss of future earning capacity; loss of retirement, health insurance, and other employment benefits and economic losses; all in an amount to be established according to proof at trial.

PROPERTY DAMAGE

143. As a further, proximate result of the above-mentioned wrongful acts and omissions of Defendants, and each of them, a picture frame belonging to Plaintiff, and previously hanging for several years without any problems, even through

earthquakes, along with several others that were not damaged, on the wall of her office at Defendant's premises, was damaged to such an extent that repairs were necessary in an amount to be established according to proof at trial.

CONSEQUENTIAL AND INCIDENTAL EXPENSES

144. As a further, proximate result of the above-mentioned wrongful acts and omissions of Defendants, and of the anticipatory breach of the statutory duty to discipline and terminate Plaintiff only for good cause, Plaintiff will be required to incur in the future certain consequential and incidental expenses that she is entitled to recover pursuant to Civil Code Section 3300 in an amount to be established according to proof at trial.

CIVIL PENALTIES

145. Plaintiff is entitled, pursuant to Section 52(b)(2) of the Civil Code, to a civil penalty of $ 25,000 against each Defendant for each violation of Section 51.7 of the Civil Code alleged in this Complaint.

146. Plaintiff is additionally entitled, pursuant to Section 1197.5 of the Labor Code, to civil penalties in double the amount of lost wages found to be in violation of the State Equal Pay Act.

PUNITIVE DAMAGES

147. Defendants HAHN and HOKINSON are attorneys who, by virtue of their training and experience, either knew or should have known about the very serious violations of law and public policy, whether based on common law, statutes, or the State Constitution, that they were committing at the time that they committed them, and that their acts and omissions were likely to injure and damage Plaintiff as in fact they did.

148. Furthermore, upon entering their profession as attorneys and their respectively elective and public office, Defendants HAHN and HOKINSON, had each taken and

subscribed to a dual, sworn oath and duty to obey, defend, and uphold the Constitution and all of the laws of the State of California and the City of Los Angeles, including among them all those that are alleged to have been violated in this Complaint.

149. Particularly reprehensible examples of the conduct of Defendants HAHN and HOKINSON are, among others and without limitation, the unconstitutional, discriminatory, and retaliatory manner in which they attempted to fire and harass Plaintiff in their now successful effort to make her quit her job after she lawfully complained of unlawful discrimination, harassment, retaliation and other violations of law by said Defendants and each of them, and the humiliating and embarrassing manner in which they took four very important cases away from her in which she had absolutely excelled in attempting to obtain the very best possible result for her client public, which cases were physically removed in front of Plaintiff's secretaries so as to publicly belittle and denigrate Plaintiff without good cause, solely to castigate and make an example of her in front of other employees whose exercise of civil rights Defendants thereby sought to inhibit. Defendant's failed attempt to investigate and fire Plaintiff unconstitutionally and without good cause, and their repeated refusal to allow her to communicate with her client as was legally and ethically required of her, were two particularly despicable attempts to force her to quit her job, warranting substantial punitive damages, since Defendants HAHN and HOKINSON forced Plaintiff to choose between violating her ethical duties as an attorney and public servant or resigning, leaving her with no honorable alternative but to do the latter.

150. The aforementioned conduct of Defendants HAHN and HOKINSON was unconscionable, willful, malicious, fraudulent, and deliberately intended to oppress and cause injury and damage to Plaintiff, in conscious and reckless disregard for not only her civil rights, but those of every other City employee, resident, and taxpayer of Defendant CITY,

whom Defendants HAHN and HOKINSON have taken a dual oath to protect and defend. Plaintiff is therefore entitled, pursuant to Sections 52(b)(1) and 3294 of the Civil Code of California, Section 12965(b) of the Government Code, and any other applicable provision of California law, to an award of punitive damages against all individual defendants except CITY, on all causes of action except the seventh, in an amount sufficient to punish and deter them from engaging in this type of conduct ever again.

ATTORNEYS' FEES AND COSTS

151. As a further, proximate result of the above-mentioned acts and omissions of Defendants, and each of them, Plaintiff was forced and required to consult and hire lawyers and other experts to protect and enforce her legal rights, including to defend the unconstitutional attempts of Defendants and each of them to discipline and terminate her without good cause, as well as to effectively prosecute this lawsuit. Plaintiff has therefore incurred and will continue to incur substantial attorneys' and experts' fees and other litigation expenses, all in an amount according to proof at trial, which Plaintiff is entitled to recover from Defendants and each of them pursuant to the provisions of Government Code § 12965(b), Code of Civil Procedure § 1021.5 and Civil Code §52(b)(3), 52.1(h) and any other applicable provision of California law.

PREJUDGMENT INTEREST

152. As a further, proximate result of the above-mentioned wrongful acts and omissions of Defendants, and each of them, Plaintiff is entitled to prejudgment interest at the highest prevailing legal rate, and to the full extent permitted by Sections 3287, 3288, and 3291 of the Civil Code, Section 1197.5(b) of the Labor Code, and any other applicable provision of California law.

DECLARATORY RELIEF

153. An actual controversy has arisen and now exists between Plaintiff and all Defendants concerning their respective legal rights and duties under the various statutes and constitutional sections referred to in this Complaint in that Plaintiff alleges that the acts and omissions complained of constitute a violation of her civil, rights under the California Constitution and the various statutes, ordinances, and codes referred to in this Complaint, and further constitute the above-described torts and violations of public policy, all of which Defendants impliedly dispute and deny by operation of law pursuant to Government Code 912.4(c) in failing and refusing to acknowledge Plaintiff's claims.

154. Plaintiff desires and requests that this Court adjudicate this controversy and enter a declaratory judgment determining the respective rights and duties of Plaintiff and Defendants.

EQUITY

155. Plaintiff has no plain, speedy, adequate, or complete remedy at law to redress the wrongs described in this Complaint. Plaintiff has been, and will continue to be, irreparably injured by the conduct of the Defendants unless this Court grants her the declaratory and injunctive relief sought in the Prayer. Plaintiff is entitled to such relief pursuant to the provisions of Civil Code Section 52.1(b) and Government Code Section 12965(b), and any other applicable provision of California law.

V
PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for judgment and orders against Defendants, and each of them, as follows:

1. For a declaratory judgment that the acts, omissions, practices, policies, and customs and pattern of conduct complained of violate Article I, Sections 1, 2, 3, 7(a), and 8, of

the California Constitution; the Fair Employment and Housing Act, the State Equal Pay Act, the Bane Act, the Ralph Act, the Meyers-Milias-Brown Act, and the Labor Code whistleblower statutes, as well as the public policy of this State embodied in those and other mentioned constitutional and statutory sections; and that they constitute the torts, unlawful employment practices, and other violations of law set forth in this Complaint.

2. For a preliminary and permanent injunction ordering Defendants to seal, pendete lite, any and all personnel and other files kept on Plaintiff anywhere within the City of Los Angeles and its City Attorney's Office and/or to purge from them any reference to the disciplinary investigation and proposed termination, and to deliver to Plaintiff the original and all existing copies of any investigative and disciplinary documents, and to retract forthwith any and all negative statements made about Plaintiff in connection with said investigation and proposed termination to any persons or entities to whom they were made.

3. For a money judgment in favor of Plaintiff against all Defendants, unless otherwise specified below, including general, special, compensatory, and punitive damages in an amount according to proof at trial, as follows:

(a) for severe emotional distress and mental anguish, humiliation, embarrassment, and anxiety;

(b) for medical and related expenses;

(c) for loss of earnings, loss of future earning capacity, loss of retirement, health insurance, and other employment benefits and economic losses;

(d) for property damage;

(e) for consequential damages and incidental expenses;

(f) for civil penalties;

(h) for punitive damages as against each individually named Defendant except CITY;

(i) for attorneys' fees and litigation expenses including experts' fees;

(g) for prejudgment interest;

(k) for costs of suit;

4. for a trial by jury of all issues so triable;

5. and for such further legal or equitable relief as this Court may deem to be just and proper.

DATED: April 24, 1997

/s/
PATRICIA J. BARRY
Attorney for Plaintiff

VERIFICATION

I am the Plaintiff in the above-entitled action. I have read the foregoing First Amended Complaint for Compensatory and Punitive Damages, Declaratory and Injunctive Relief, Attorney's Fees, Civil Penalties and Costs and know its contents. The facts stated in the foregoing document are true of my own knowledge except as to those matters stated on information and belief, and as to those matters, I believe them to be true.

I declare under penalty of perjury under the laws of the State of California, that the foregoing is true and correct.

DATED: April 24, 2997

s/s
OLGA H. GARAU, Declarant

Supreme Court, U.S.
FILED
JAN 21 1999
CLERK

No. 98-1004

In The

Supreme Court of the United States

October Term, 1998

OLGA H. GARAU,

Petitioner,

v.

JAMES K. HAHN, THOMAS C. HOKINSON and CITY OF LOS ANGELES,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of California

RESPONDENTS' BRIEF IN OPPOSITION

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33PP

QUESTIONS PRESENTED

1. Does the United States Supreme Court have jurisdiction to review a United States Constitution Fourteenth Amendment equal protection issue on which no California court in this case has issued an opinion and that was raised for the first time in the California Court of Appeal.

2. Should the United States Supreme Court grant review of a United States Constitution Fourteenth Amendment equal protection issue involving discretionary acts immunity granted to California's government employees under California Government Code section 820.2 where the issue was not raised in the trial court or addressed by any court in this case, and all published opinions that have addressed the issue have uniformly decided that discretionary acts immunity does not violate equal protection rights?

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OPINIONS AND ORDERS BELOW

The orders and judgment listed below are unpublished and are reprinted in the Respondent's Appendix ("RA") to this opposition.

In addition, the two pages from the record on appeal cited by Petitioner at page 10 of the Petition For Writ of Certiorari are also included in the Respondent's Appendix at RA – 1.

The February 24, 1998 Order Granting Defendant's Motion For Summary Adjudication is at RA – 4.

The March 11, 1998 Order Granting Defendant's Motion For Summary Judgment is at RA – 6.

The March 11, 1998 Judgment By Court Order Under C.C.P. Section 437c Against Plaintiff And In Favor Of Defendant City Of Los Angeles is at RA – 9.

JURISDICTION

Petitioner claims this court has jurisdiction over the question she presents, stating the "Federal Question" was raised "IN THE COURT OF FIRST INSTANCE" which would be in the Los Angeles Superior Court. Pet. 10. This is not true. There is no reference to the United States Constitution, or to the equal protection clause of the United States Constitution in the Superior Court record cited by Petitioner. RA – 1-3. Petitioner did not raise the issue until she reached the California Court of Appeal and that court's opinion does not address the issue. The

California Court of Appeal, like this court, does not review issues not properly raised below.

STATEMENT OF THE CASE

1. Introduction

Petitioner Olga Garau petitions for review on an issue that was not raised in the trial court, not addressed by the Court of Appeal (presumably because it was never raised in the trial court), and on which the California Supreme Court denied review. Thus, there is no federal issue that has been decided by any California court in this case, let alone any federal issue over which the United States Supreme Court would have jurisdiction to review.

Garau, formerly a deputy city attorney of the City of Los Angeles, admits under oath in her First Amended Complaint that she became embroiled in a dispute with her employer – the City – when she filed a written motion with the Ninth Circuit Court of Appeals complaining about her co-counsel, who was a co-worker and an assistant city attorney, because he had obtained an extension for filing a brief without her knowledge. The Office of the City Attorney, as in house counsel for her employer – the City of Los Angeles – was embarrassed by her action and directed her to withdraw the motion against her co-worker. But petitioner refused. Due to petitioner's insubordination in response to a directive from *the* city attorney to withdraw the motion, her supervisor reassigned four of her cases to another attorney. Her supervisor also gave her a "Skelly" notice [*Skelly v. State Personnel Bd.*, 15

Cal.3d 194, 215 (1975)] which begins the procedure for instituting disciplinary or dismissal proceedings.

Petitioner was given a deadline to respond to the Skelly notice, and she was subsequently also given an extension to respond to the notice.

Instead of responding as provided under the "Skelly" procedure, petitioner simply filed a lawsuit and then resigned from her position. Her lawsuit was against her employer – the City of Los Angeles – as well as two individuals who are not her employers: James K. Hahn, the City Attorney, and Thomas C. Hokinson, Chief Assistant City Attorney for the Department of Water and Power. She claimed discrimination under state law based on sex, ancestry, and national origin, along with 15 other causes of action. Petitioner's lawsuit against the individual defendants was dismissed for failure to state a cause of action. As to five causes of action, the court concluded that they could only be against an employer and because the individual defendants were not her employer, petitioner could not pursue those causes of action against the individuals. As to all causes of action, the court concluded that the individual defendants were immune from liability for the disciplinary actions against petitioner under California Government Code section 820.2, the discretionary acts immunity provisions covering government employees.

Petitioner's appeal to the California Court of Appeal, and her petition for review to the California Supreme Court were both unsuccessful. The Court of Appeal affirmed the dismissal by the trial court, and the Supreme Court denied review. Petitioner did not raise in the trial

court the issue she now asks this court to review and neither the trial court nor the Court of Appeal nor the Supreme Court discussed petitioner's claim of violation of equal protection under the Federal Constitution.

2. Misrepresentations concerning the facts.

Petitioner fails to disclose in her statement of facts the incident leading to the disciplinary action against her. Pet. 6-7. That incident, as set forth in her First Amended Complaint, which she verified under oath, was her filing of a motion in the Ninth Circuit Court of Appeal accusing an assistant city attorney of "misconduct" because he had obtained an extension to file a brief. Pet. A:37 ¶ 34.

Petitioner also fails to disclose to this court in her fact statement that she was directed by her supervisor to withdraw the motion but she refused, and her insubordination resulted in disciplinary proceedings. Pet. A:37 ¶ 34.

Petitioner also does not disclose that the City of Los Angeles gave her proper "Skelly" notice of the proposed disciplinary action, to which she was entitled to present a written response. She was even given an extension of time to respond but she never offered any written response. Instead, she filed a lawsuit against the defendants and resigned. Her claims of employment "termination" and that she was "forced to quit" misrepresent the above facts. Pet. 6-7.

3. Misrepresentations concerning the procedural posture.

Petitioner identifies the discretionary acts immunity statute – California Government Code section 820.2 – as the only basis on which her complaint was dismissed. Pet. 8. She fails to disclose that five of her 16 causes of action were also dismissed because they are based on theories of recovery that allow a right of action only against an employer, and the two individual defendants were not her employer.

While petitioner claims she has been denied equal protection under the United States Constitution because she could not pursue the individual defendants, she does not disclose in her procedure section that

(1) her action for all 16 causes of action against the City of Los Angeles continued,

(2) she later dismissed three of her causes of action against the City of Los Angeles, and

(3) her action against the City of Los Angeles has now proceeded to judgment, and she lost that action on the merits. RA – 3-9.

Thus, she was not prevented from seeking a remedy against her employer, and it has now been determined that her entire action is meritless. RA – 4-10.

REASONS FOR DENYING THE PETITION

I. THERE IS NO JURISDICTION BECAUSE PETITIONER DID NOT TIMELY RAISE THE UNITED STATES CONSTITUTION EQUAL PROTECTION ISSUE IN THE TRIAL COURT.

Contrary to petitioner's claim that she raised the United States Constitution equal protection issue during argument in the lower court, the transcript of that argument, which she cites in her petition, contains no mention of any equal protection argument. RA – 1-2. Moreover, after petitioner failed to raise the issue in the trial court, the California Court of Appeal did not discuss the equal protection argument that she raised for the first time on appeal. Neither did the California Supreme Court grant review of the equal protection issue, which was not addressed in the Court of Appeal opinion.

When "the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary." *Street v. New York*, 394 U.S. 576, 582 (1969).

Petitioner made no showing to the contrary. There is no jurisdiction to review this issue.

II. PETITIONER'S CASE AGAINST HAHN AND HOKINSON DOES NOT MEET THE RULE 10 STANDARDS FOR REVIEW ON A WRIT OF CERTIORARI; THE QUESTION PRESENTED IN THE PETITION IS NOT ADDRESSED BY ANY COURT BELOW.

The Rule 10 considerations for the United States Supreme Court granting review have not been met, and there are no other compelling reasons for granting review.

Rule 10(b) provides for review when

> a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals.

But the state court of last resort here made no decision whatsoever concerning any federal question and no federal question was raised by petitioner at the trial level.

Rule 10(c) provides for review when

> a state court . . . has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

But the state court in this case has not decided *any* question of federal law, let alone an important question of federal law, there having been no question of federal law raised in the first instance. Thus, there is nothing for this court to review and no law to be settled.

Moreover, in view of petitioner's late raising of the issue that she now asks this court to decide, it was not

appropriate for either the California Court of Appeal or the California Supreme Court to address the issue.

Finally, as explained below, the law is overwhelming concerning the meritlessness of petitioner's equal protection argument. There is no basis for granting review.

III. THE FACT SPECIFIC EQUAL PROTECTION ARGUMENT AS TO THE INDIVIDUAL DEFENDANTS IS MERITLESS.

A. Every Published Opinion Addressing The Equal Protection Challenge To Governmental Discretionary Acts Immunity Has Rejected It.

1. The Equal Protection Clause And The Rational Basis Test.

The law governing the constitutional parameters of the equal protection clause within both the California and United States Constitutions is well-settled and no conflicting law on the meaning or application of the Equal Protection Clause exists in California, the federal courts, or the United States Supreme Court.

All of the cases say that the Equal Protection Clause does *not* forbid a state or federal Legislature from imposing any statutory classifications. *Atchison, T. & S.F.R. Co. v. Matthews,* 174 U.S. 96, 102 (1899); *Stanley v. City and County of San Francisco,* 48 Cal.App.3d 575, 580-581 (1975); *McAllister v. South Coast Air Quality etc., Dist.,* 183 Cal.App.3d 653, 659 (1986).

The decisions of the courts are equally uniform that the Equal Protection Clause does *not* command that all persons be treated alike. *Kranson v. Valley Crest Nursing*

Home, 755 F.2d 46, 52 (1985). Rather, that clause directs only that "all persons similarly situated should be treated alike." *City of Cleburne, Tex. v. Cleburne Living Center*, 473 U.S. 432, 439 (1985).

The standard for measuring the validity of state legislation against the dictates of the Equal Protection clause begins with various well-settled principles, not the least of which include the *presumption* that the legislature acted within constitutional limits and with the purpose of promoting the interests of the people as a whole. *Id.* at 439; *Atchison, T. & S.F.R. Co. v. Matthews*, 174 U.S. at 104; *Stanley v. City and County of San Francisco*, 48 Cal.App.3d at 579.

Moreover, there is no confusion or conflict in the lower courts that state and federal legislatures are provided broad discretion in making classifications. Statutes will be upheld against constitutional attack where the classification bears a reasonable, rational relationship to a legitimate state interest. *City of Cleburne, Tex. v. Cleburne Living Center*, 473 U.S. at 439; *County of Los Angeles v. Superior Court*, 62 Cal.2d 839, 846 (1965); *Reed v. City & County of San Francisco*, 237 Cal.App.2d 23, 24 (1965). A classification must be reasonable, not arbitrary, and any ground of distinction must have a fair relation to the object of the litigation. *Johnson v. Robison*, 415 U.S. 361 (1974). "A statutory discrimination will not be set aside as a denial of equal protection of the laws if any state of facts reasonably may be conceived to justify it." *Metropolitan Casualty Ins. Co. v. Brownell*, 294 U.S. 580, 584 (1935); *Plyler v. Doe*, 457 U.S. 202, 216 (1982); *Stanley v. City and County of San Francisco*, 48 Cal.App.3d at 579.

2. Under Settled Law Governmental Immunity Statutes Do Not Violate The Equal Protection Clause.

a. The Sovereign Immunity Doctrine.

For over 30 years, the California Tort Claims Act (California Government Code section 810 et seq.) has withstood constitutional attack. *Martinez v. State of Cal.*, 444 U.S. 277, 282 (1980); *Datil v. City of Los Angeles*, 263 Cal.App.2d 655, 660-661 (1968); *Roberts v. State of California*, 39 Cal.App.3d 844, 849 (1974). The reason is because a legitimate, reasonable public interest is served by imposing limitations upon the manner and the extent to which governments and their public officials can be sued.

Immunities provided to governments and their public officials are a product of the time-honored legal doctrine of sovereign immunity. *Smith v. Reeves*, 178 U.S. 436, 448 (1900) [The doctrine is so well-settled "it is hardly necessary to be formally asserted."].

Despite any infirmities in the now-archaic concepts of kingdoms, the modern sovereign immunity doctrine has survived to encompass the basic premise that the sovereign state is immune from any liability whatsoever unless it gives its consent to be sued. *Grimes v. Pearl River Valley Water Supply Dist.*, 930 F.2d 441, 443 (5th Cir. 1991); *Stanley v. City and County of San Francisco*, 48 Cal.App.3d at 578-579. The United States, a sovereign state, is immune from suit except to the extent it expressly consents to be sued. *Dalehite v. United States*, 346 U.S. 15, 30 (1953); *United States v. Sherwood*, 312 U.S. 584, 586 (1941). States and other governmental entities within the state are immune from suit except to the extent they expressly

consent to be sued. *Hans v. State of Louisiana*, 134 U.S. 1 (1890).

Moreover, a state has the power to prescribe the terms and conditions upon which it will be sued. *Hans v. State of Louisiana*, 134 U.S. at 17. It can even withdraw its consent to be sued. *Id.*; *Lynch v. United States*, 292 U.S. 571, 581 (1934). The sovereign state "remains free to create substantive defenses or immunities for use in adjudication – or to eliminate its statutorily created causes of action altogether. . . . " *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 432 (1982); *Ferri v. Ackerman*, 444 U.S. 193, 198 (1979); *Miller v. U.S.*, 73 F.3d 878, 881 (9th Cir. 1995).

The most common expression of the sovereign state's consent to be sued is found in legislation pertaining to state and federal tort claims. See, *Wright v. United States*, 719 F.2d 1032, 1034 (1983) [The Federal Tort Claims Act waives sovereign immunity making the United States liable in tort as prescribed in that Act].

The California Legislature enacted a series of statutes in 1963 that expressly provide that sovereign immunity exists to protect the state, public entities, and public officials from tort liability except in those limited areas where the Legislature has expressly authorized suit. *Roberts v. State of California*, 39 Cal.App.3d at 849. The California Tort Claims Act, Government Code section 815 et seq., "sets out a carefully devised statutory scheme under which the government and other public entities can be sued." *Stanley v. City and County of San Francisco*, 48 Cal.App.3d at 579. "In short, sovereign immunity is the rule in California; governmental liability is limited to exceptions specifically set forth by statute." *Cochran v.*

Herzog Engraving Co., 155 Cal.App.3d 405, 409 (1984); *Harshbarger v. City of Colton*, 197 Cal.App.3d 1335, 1339 (1988).

Thus, the California Tort Claims Act, like all tort claims acts, makes a distinction between governmental-tort victims and nongovernmental-tort victims. That statutory classification has repeatedly and uniformly been held "to have a fair and substantial relation to the object of the legislation" and to promote numerous legitimate state interests. *Stanley v. City and County of San Francisco*, 48 Cal.App.3d at 581. Placing governmental agencies in a classification different from nongovernmental agencies is a reasonable and constitutionally valid classification. *Wadley v. County of Los Angeles*, 205 Cal.App.2d 668, 673 (1962); *Powers Farms v. Consolidated Irr. Dist.*, 19 Cal.2d 123, 131 (1941) [same]; *Dias v. Eden Township Hospital Dist.*, 57 Cal.2d 502, 504 (1962) [same].

There is no conflict in the law that would justify review in this Court. Moreover, this Court has already determined, as recently as 1980, that the California Tort Claims Act bears a rational relationship to the State's purposes. *Martinez v. State of Cal.*, 444 U.S. 286, 282 (1980).

Both state and federal courts have consistently and uniformly held that tort claims acts prescribing the limits upon which a governmental entity can be sued do not violate either the due process clause or the equal protection clause of the constitution. *Grimes v. Pearl River Valley Water Supply Dist.*, 930 F.2d at 444; *Tammen v. County of San Diego*, 66 Cal.2d 468, 481 (1967); *Stanley v. City and County of San Francisco*, 48 Cal.App.3d at 579.

b. Discretionary Acts Immunity Bears A Rational Relationship To A Legitimate State Interest.

Courts have consistently and uniformly held the discretionary acts immunity (as set forth in California's Government Code section 820.2 as well as the similarly-phrased Federal Tort Claims Act) does not violate either the due process clause or the equal protection clause.

The discretionary acts immunity contained within the Federal Tort Claims Act was sanctioned by this Court in *Dalehite v. United States*, 346 U.S. at 34-36. This Court recognized that when the United States consented to be sued by passing the Federal Tort Claims Act, Congress never intended that its public officials exercising their decision-making judgment in the course of performing their public duty should have their judgments tested by suits for tort damages. *Id.* at 27.

The fundamental, legitimate state purpose in affording discretionary acts immunity to public officials is to preclude tort claims arising from decisions by governmental administrators where those decisions require judgment and policy choices. *Wright v. United States*, 719 F.2d at 1035. The whole idea is to shield public officers "from undue interference with their duties and from potentially disabling threats of liability." *Harlow v. Fitzgerald*, 457 U.S. 800, 806 (1982); *Dalehite v. United States*, 346 U.S. at 36.

There is no confusion or conflicting law; the law is the same in California. *Muskopf v. Corning Hospital Dist.*, 55 Cal.2d 211, 220-221 (1961).

With this considerable, unchallenged, well-settled justification supporting the discretionary acts immunity, the very immunity statute that petitioner attacks here was declared constitutional in California. *Bonds v. State of California ex Rel. Cal. Highway Patrol*, 138 Cal.App.3d 314, 322 (1982). In *Bonds*, the California Court of Appeal concluded that a sovereign state's legitimate right to impose conditions and limitations on the right of a claimant to bring suit against it or its public officials provided ample justification and a rational basis for the distinction between the private sector and the public sector. "Thus, the state may preclude causes of actions based on the discretionary acts of its employees." *Id.*

Therefore, there is no contrary or conflicting authority that would justify review by this Court. There is no federal question presented that has not been settled by this Court, let alone an important question of federal law, that would justify review.

B. Discretionary Acts Immunity Does Not Deny Equal Protection Of The Laws To Public Employees When Applied To Employment Discrimination Cases.

Petitioner contends that discretionary acts immunity denies equal protection to public employees for discrimination in employment. The argument, to the extent it can be followed, seems to suggest (1) that public employees are denied equal protection because they are prevented from suing their supervisors under circumstances where private sector employees can sue their supervisors and

(2) she cannot recover punitive damages against a government entity.

The problem with petitioner's contentions is that discretionary acts immunity did not act in practical effect to deprive plaintiff of equal protection of the law because no employee (public or private) may sue their supervisors for discrimination in employment under California law. *Reno v. Baird*, 18 Cal.4th 640 (1998). In *Reno v. Baird*, a private sector employee sued individual supervisors seeking to recover monetary damages for, among other things, discrimination in employment under California's Fair Employment And Housing Act (FEHA) (the very statute upon which petitioner based her claims against these individual defendants). The California Supreme Court concluded in *Reno v. Baird* "that individuals who do not themselves qualify as employers may not be sued under FEHA for alleged discriminatory acts." *Id.* at p. 663.[1] Even in the private sector then, individual supervisors cannot be held personally liable for discrimination in employment. And, without the imposition of personal liability, there would be no right to recover punitive damages. Thus, the discretionary acts immunity statute does not have the practical effect of depriving petitioner of any redress that would otherwise be available to her if she were employed in the private sector. Petitioner was not denied the equal protection of the laws.

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[1] The law is the same under the federal statutory counterpart for discrimination in employment cases, the Civil Rights Act of 1964, Title VII, 42 U.S.C. § 2000e et seq. *Miller v. Maxwell's Intern. Inc.*, 991 F.2d 583, 587 (9th Cir. 1993).

Moreover, petitioner cannot complain that she, as a public employee, is somehow deprived of equal protection of the laws because other members of the general public can recover punitive damages against a municipality. That is not the law. No person (whether in the public or private sector) can recover punitive damages from a municipality. See, *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 271 (1981). Therefore, petitioner stands on like footing with all other public and private citizens and there is no denial of equal protection.

Finally, petitioner has no factual or legal basis to contend that she was denied equal protection of the laws. Petitioner did pursue her suit against the City and lost. RA – 4-10. Summary judgment was granted and the trial court awarded attorneys fees in favor of the City of Los Angeles for petitioner's pursuit of a frivolous lawsuit.

CONCLUSION

For all of the reasons stated above, the petition for a writ of certiorari should be denied.

Dated: January 21, 1999

Respectfully submitted.

CHRISTINE T. HOEFFNER
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Counsel for Respondents James K. Hahn, Thomas C. Hokinson, and City of Los Angeles

RESPONDENT'S APPENDIX

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Court of appeal record of Appellant's Appendix, pages 107-108, as cited in Petition For Writ of Certiorari at page 10 ..... RA-1

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March 11, 1998 Order Granting Defendant's Motion For Summary Judgment..... RA-6

March 11, 1998 Judgment By Court Order Under C.C.P. Section 437c Against Plaintiff And In Favor Of Defendant City Of Los Angeles RA-9

APPENDIX

* * *

[Court of appeal record, p. 107] BOSS WORKER EMPLOYEE.

SHE DID NOT PERFORM ADMINISTRATIVE DUTIES. SHE DID NOT PERFORM OTHER DUTIES LIKE SHE WASN'T AN ENGINEER FOR THE DEPARTMENT OF WATER AND POWER. SHE WAS A LAWYER. AND SHE HAD TO PROVIDE CERTAIN, SHE HAD TO PERFORM CERTAIN DUTIES FOR THE DEPARTMENT OF WATER AND POWER.

AND SO THERE COMES A TIME WHEN YOU HAVE TO SAY TO YOUR BOSS "WAIT A MINUTE. I AM A LAWYER, MR. HAHN. AND I HAVE GOT CERTAIN RESPONSIBILITIES TO MY CLIENT."

AND SO I BEG TO DIFFER. I THINK THAT THERE IS A DIFFERENCE GOING ON. WHAT I AM CONCERNED ABOUT IS THAT IN THE RESPONSE, YOUR HONOR, IN THE OPPOSITION, THEY ARE VERY CAVALIER WITH THIS RELATIONSHIP, AND THEY WERE READY TO DISMISS IT. IT'S SOMEBODY THAT HAD A BEEF, BECAME VERY INSUBORDINATE. AND WE HAD TO DO SOMETHING ABOUT THIS VERY INSUBORDINATE LADY. WELL, I THINK THAT'S SEXISM CREEPING INTO THIS COURTROOM IN THE GUISE OF AN OPPOSITION.

SHE WAS A LAWYER AND SHE HAD CERTAIN RESPONSIBILITIES. AND WE HAVE TO LOOK AT THAT VERY CAREFULLY, WHICH THEN RETURNS US TO THE ISSUE OF HOKINSON AND HAHN.

AND FINALLY, YOUR HONOR, WE DIDN'T PRESENT, AND MY CLIENT WHO WAS A BRILLIANT LAWYER HERSELF BROUGHT IT UP AND SHE SAID, YOU KNOW, WAIT A [Court of appeal record, p. 108] MINUTE. IF THIS WERE A CORPORATION, I WOULD BE ABLE TO GET PUNITIVES WHICH WE KNOW FROM THE HISTORY OF MANY CASES THAT ARE TRIED IN THIS AREA IS THE BULK OF DAMAGES IN THE PRIVATE SECTOR.

OKAY. SO SHE CHOSE TO WORK FOR THE GOVERNMENT. SHE MAY HAVE HAD MORE BENEFITS THAN WHAT A LOT OF CORPORATE EMPLOYEES GET. BUT ON THE OTHER HAND, IN DISMISSING HOKINSON AND HAHN WAS HER OPPORTUNITY TO ALSO HAVE THE OPPORTUNITY TO OBTAIN AT LEAST SOME DAMAGES. IT CERTAINLY WOULDN'T BE THE SAME IF SHE WERE GOING AFTER A CORPORATE EMPLOYER.

AND IT'S THOSE AREAS THAT I WOULD ASK THE COURT TO TAKE A LOOK AT AND PERHAPS RECONSIDER HIS RULING.

MS. MILLER: YOUR HONOR, I WOULD JUST CITE TO YOU CALDWELL VERSUS MONTOYA AT 10 CAL.4TH 972 WHICH IS THE CALIFORNIA SUPREME COURT THAT HELD THAT INDIVIDUALS ARE IMMUNE FROM LIABILITY UNDER 820.2. SO I BELIEVE YOUR TENTATIVE IS PERFECTLY CORRECT.

THE COURT: IT IS. DEMURRER SUSTAINED WITHOUT LEAVE TO AMEND AS TO HOKINSON AND HAHN AND WITHOUT LEAVE TO AMEND AS TO THE CITY WITH REGARD TO 10, 14 AND 15.

JUST A THOUGHT AS WE GO WENDING OUR WAY TOWARD THE TRIAL OF THIS CASE. I REALIZE THAT MATTERS MAY GET RESOLVED BY SUMMARY JUDGMENT OR MAY GET RESOLVED BY PLAINTIFF'S COUNSEL DECIDING WHAT THEORIES SHE WANTS TO PRESENT. BUT I AM LOOKING AT WHAT IS NOW,

* * *

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

OLGA H. GARAU, Plaintiff, v. JAMES K. HAHN, THOMAS C. HOKINSON, CITY OF LOS ANGELES, and DOES 1 to 20 Inclusive, Defendants.	CASE NO. BC 168531 [Honorable Richard P. Kalustian] **ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY ADJUDICATION** Date: February 13, 1998 Time: 8:45 a.m. Dept: "17" Case Filed: 4/1/97 Motion Cut-Off: 2/28/98 Discovery Cut-Off: 2/28/98 Trial Date: 3/30/98

(Filed and Entered Feb. 24, 1998)

The Motion of Defendant CITY OF LOS ANGELES for summary adjudication as to Plaintiff's second, fourth, sixth and seventh causes of action to Plaintiff's verified First Amended Complaint came on regularly for hearing on February 3, 1998, at 8:45 a.m. in Department "17."

Prior to the hearing, Plaintiff dismissed the second, sixth and seventh causes of action.

On proof being made to the satisfaction of this Court that the motion should be granted and good cause appearing therefore,

IT IS ORDERED that Defendant's motion for summary adjudication as to the Fourth Cause of Action,

violation of the Ralph Civil Rights Act, Code of Civil Procedure section 51.7, is granted in Defendant's favor as there is no triable issue of material fact.

IT IS ALSO ORDERED that Plaintiff's request for a continuance of the hearing is denied in that Plaintiff has failed to satisfy the requirements set forth in Code of Civil Procedure section 437c(h).

DATED: FEB 24 1998, 1998 RICHARD KALUSTIAN
Richard P. Kalustian
Judge of the Superior Court

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**SUPERIOR COURT OF THE
STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES**

OLGA H. GARAU, Plaintiff, v. JAMES K. HAHN, THOMAS C. HOKINSON, CITY OF LOS ANGELES, and DOES 1 to 20 Inclusive, Defendants.	CASE NO. BC 168531 [Honorable Richard P. Kalustian] **ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT** Date: 2/26/98 Time: 8:45 a.m. Dept: "17" (Filed and Entered March 11, 1998)

The motion of defendant CITY OF LOS ANGELES for summary judgment, or alternatively, summary adjudication of the first, third, fifth, eighth, ninth, twelfth and sixteenth causes of action of plaintiff's verified first

amended complaint came on regularly for hearing on February 26, 1998 at 8:45 a.m. in Department 17.

On proof being made to the satisfaction of this Court that the motion should be granted and good cause appearing, therefore

IT IS HEREBY ORDERED that defendant's motion for summary judgment is granted as follows:

1. There are no material triable issues of fact as to plaintiff's first cause of action for violation of Government Code section 12940, et seq. Plaintiff has not established facts to show that she was subjected to any discrimination based on gender and/or national origin.

2. There are no material triable issues of fact as to plaintiff's third cause of action for violation of Code of Civil Procedure section 52.1. The Bane Act does not apply to employment discrimination actions.

3. There are no material triable issues of fact as to the fifth cause of action for violation of Labor Code section 1102.5. Plaintiff was not terminated for being a whistleblower or in retaliation for complaining of alleged discrimination.

4. There are no material triable issues of fact as to the eighth cause of action for violation of Article 1, section 2 of the California Constitution, or as to the ninth cause of action for the violation of Article 1, section 3 of the California Constitution. Plaintiff's speech was not protected as a matter of public concern.

5. There are no material triable issues of fact as to the twelfth cause of action for violation of Article 1,

section 8 of the California Constitution per the above and below ruling.

6. There are no material triable issues of fact as to the sixteenth cause of action for constructive discharge, as plaintiff's working conditions were not intolerable to a reasonable attorney.

The Court considered relevant, competent evidence and disregarded irrelevant, incompetent evidence.

IT IS ALSO ORDERED that plaintiff's request for a continuance of the hearing is denied in that plaintiff has failed to satisfy the requirements set forth in Code of Civil Procedure section 437c(h). DATED: 3/11, 1998

By /s/ Richard P. Kalustian
Honorable
Richard P. Kalustian
Judge of the Superior Court

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

OLGA H. GARAU, Plaintiff, v. JAMES K. HAHN, THOMAS C. HOKINSON, CITY OF LOS ANGELES, and DOES 1 to 20 Inclusive, Defendants.	CASE NO. BC 168531 [Honorable Richard P. Kalustian] **JUDGMENT BY COURT ORDER UNDER C.C.P. SECTION 437c AGAINST PLAINTIFF AND IN FAVOR OF DEFENDANT CITY OF LOS ANGELES** (Filed and Entered March 11, 1998)

On February 26, 1998, the motion for summary judgment of defendant CITY OF LOS ANGELES came on regularly for hearing in Department "17" of the above-entitled Court, the Honorable Richard P. Kalustian presiding. Plaintiff appeared on behalf of herself. Linda C. Miller of Rushfeldt, Shelley & Drake LLP appeared on behalf of defendant CITY OF LOS ANGELES.

Based on the papers submitted by all parties, the Court granted the motion for summary judgment of defendant CITY OF LOS ANGELES. The motion was granted on the grounds that plaintiff failed to raise a triable issue of material fact as to her claims against defendant, as reflected in the oral record.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that judgment be entered against plaintiff OLGA GARAU and in favor of defendant CITY OF LOS ANGELES. Defendant shall recover said costs of suit from plaintiff in the amount of $_____.

DATED: 3/11, 1998

By /s/ Richard P. Kalustian
Honorable
Richard P. Kalustian
Judge of the Superior Court

Supreme Court, U. S.
F I L E D
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CLERK

(3)

No. 98-1004

In the

Supreme Court of the United States

October Term, 1998

OLGA H. GARAU,

Petitioner,

v.

JAMES K. HAHN, THOMAS C. HOKINSON and CITY OF LOS ANGELES,

Respondents.

On Petition for A Writ of Certiorari
to the Supreme Court of California

PETITIONER'S REPLY BRIEF

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No. 98-1004

In the

Supreme Court of the United States

October Term, 1998

OLGA H. GARAU,

Petitioner,

v.

JAMES K. HAHN, THOMAS C. HOKINSON
CITY OF LOS ANGELES

Respondents.

PETITIONER'S REPLY BRIEF

RESPONDENTS HAVE LIED TO THIS COURT ABOUT PETITIONER'S REPRESENTATIONS AS TO THE PROCEDURAL POSTURE

Contrary to Respondents' contention at RB:5, Petitioner ***did*** inform this Court (as well as the California Court of Appeal and the California Supreme Court) that, under pressure from the trial judge, she dismissed three causes of action (See Pet:23), ***and*** that the remainder of her case continued against the City of Los Angeles only to be dismissed on summary judgment (see Pet:23), by a biased judge who failed to follow even the minimum statutory procedures required of him when his impartiality was challenged, let alone the Canons of Judicial Ethics.

And Petitioner did not represent that all sixteen causes of action against the City survived demurrer because in fact they did not: the trial judge dismissed three causes of action on demurrer,[1] leaving only 13, of which two were dismissed on motion for judgment on the pleadings due to the failure of Petitioner's attorney to file written opposition,[2] and the remaining 12 were disposed of summarily without trial.[3]

RESPONDENTS HAVE ALSO MISSTATED AND OMITTED THE FOLLOWING KEY FACTS

1. Petitioner's motion to the Ninth Circuit Court of Appeals in October of 1996 was not the genesis of her constitutional and civil rights claims against Respondents, but their pretext. A long history of facts dating back to 1990 is detailed in the First Amended Complaint at A: 32-44. Petitioner's verbal complaints to her supervisors about it as early as March of 1996 and her October 15, 1996 formal

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[1] Count 14 for intentional and negligent infliction of emotional distress and count 10 for negligence per se on grounds of workers' compensation exclusivity contrary to clearly established state precedent, and count 15 for state due process violation on grounds of waiver which is a question of fact for the jury that could not be decided on demurrer.

[2] Count 11 for state equal protection violations and count 13 for abuse of official authority in violation of public policy, which was accordingly not a decision on the merits.

[3] Partial summary adjudication was granted as to Count 4 for violation of the Ralph Act, premised upon the physical destruction of a picture frame in Petitioner's office. And a second motion for summary judgment disposed of the remaining seven remaining causes of action for violations of FEHA [(*Government Code §12940*)], the Bane Act (*Civil Code §52.1*, whistleblower statute at *Labor Code §1102.5,* free speech at Art. I, §2 of the California Constitution, right to petition the government at Art. I, §3 of the state constitution, anti-discrimination clause of the State's Constitution (Art. I. §8), and the common-law tort of constructive wrongful termination in violation of fundamental public policy embodied in all of the constitutional and statutory sections alleged.

written complaint of discrimination, retaliation, and harassment, to Respondent Hahn, all went unheeded and unredressed. Her 9th Circuit motion, complaining to the Ninth Circuit in essence about discrimination by a male Caucasian co-counsel to protect her client's litigation position, is what triggered full-blown retaliation against her: the employment termination threatened by Respondents in the "Skelly" notices referred to in their brief, which became even more pointed after she filed her formal government claim and administrative charge with the California Department of Fair Employment and Housing. See Pet.:7.

2. Petitioner refused to withdraw the motion in the 9th Circuit because it negatively affected her client's interests. See Petitioner's explanatory memorandum to her supervisor attached for the Court's benefit at A:85-87. The motion is also attached to this Reply Brief at A:74-84 so that this Court can determine for itself what actually happened.

3. The gravamen of Petitioner's complaint against Respondents is therefore retaliation, which they have downplayed and notably omitted throughout this case, even at RB:3, since the nexus between her October 15, 1996 formal written complaint of discrimination to the City Attorney and the disciplinary proceedings initiated barely three weeks later in connection with the 9th Circuit motion is so obvious.

4. A "Skelly" notice is a constitutionally-required procedure for Petitioner's benefit. But while "entitled" to it, she is not legally required to respond to it, no matter how many opportunities to respond are afforded, contrary to Respondents' insinuation at RB:3-4.

5. Petitioner did not misrepresent any facts regarding her constructive wrongful termination. She was forced to leave her position by a long series of events detailed in her First Amended Complaint at A:33-44, wrongfully created and maintained by Respondents in violation of fundamental public policy, and of her duties as an attorney, which Respondents share and precluded her from performing.

6. Finally, Respondents omit to tell this Court that it is irrelevant as to Respondent Hokinson in these proceedings that four counts were dismissed on dual employment grounds because Hokinson was not a named defendant as to those counts. (See 2nd, 5th, 6th, and 16th causes of action in the First Amended Complaint at A:51, A:53, A:54, and A:65).

NEW FACTS OCCURRING AFTER RESPONDENTS' BRIEF IN OPPOSITION

On January 21, 1999, the California Court of Appeal dismissed both of Petitioner's pending state appeals without giving her the required prior notice of when the briefs were actually due as the Court did in the first appeal currently before this Court. So Petitioner is now virtually without a remedy and liable to pay 111,845.19 in attorneys' fees and costs that she does not have if certiorari is not granted.[4]

WHY CERTIORARI SHOULD BE GRANTED

1. Petitioner did raise the equal protection issue in the trial court. She should not be penalized because her attorney, who incidentally was Patricia J. Barry—who successfully argued a landmark sexual harassment case before this Court,

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[4] While Petitioner is concurrently filing a motion to vacate the dismissal of those appeals on procedural due process grounds, we can only surmise what the state appellate court's ruling will likely be.

and who ceased representing Petitioner just prior to the summary judgment motions below—did not specifically mention the particular constitutional section, although she did raise the issue. (See RA:1-2). The law respects form less than substance. *See California Civil Code § 3528.*

2. And it is simply not true, as Respondents contend, that Petitioner has not made the affirmative showing required to refute the presumption that the state courts did not decide the question because the issue was not properly raised. The equal protection argument was squarely presented to each and every court below. See Pet:10-14. They simply chose to avoid deciding it because of their own conflict of interests as supervisors in the California public sector, which is why at a minimum Petitioner implores this Court to grant her leave to amend a 42 U.S.C. 1983 cause of action so she can go to an impartial federal forum where justice will be done.

3. It is not necessary for the state courts to have addressed the federal question. Where properly raised, their failure to address it, is itself reviewable by this Court. See Pet.:22.

4. Moreover, conflict in the law is not the only grounds for granting certiorari as insinuated by Respondents. Importance of the question presented, particularly to the public interest and to the integrity of our profession, as here, is an even more compelling ground for granting review. The equal protection rights of tenured public employees in civil rights litigation is a question of national significance. So are the ethical obligations of public lawyers which lie so much at the heart of this case in more ways than one. These issues were important enough to compel Respondents to file a Brief in Opposition, and to have misrepresented in it a number of key facts and points of law in order to mislead (as if they could . . .!) this venerable Court into denying review.

SUMMARY OF ARGUMENT

Respondents' Brief in Opposition, at page 8, misses the point completely: Petitioner is not arguing that government cannot have immunity. But rather that, as recognized by federal law, when it comes to constitutional and civil rights claims, the immunity of public officials, as opposed to that of the entity, is not absolute but qualified by good faith. And that because California law fails to acknowledge this, it violates the Federal Equal Protection Clause.

RESPONDENTS ALSO MISREPRESENT THE LAW AND ATTEMPT TO MISLEAD THE COURT AS TO ITS TRUE IMPORT

A. The Narrow Question Presented Has Never Been Decided By this or any Other Court

All of the cases cited by Respondents' upholding the constitutionality of California's Tort Claims Act involve only common-law wrongful death claims against the State, and ***not*** the constitutional and civil rights claims raised by Petitioner, a *tenured* public employee. *Roberts v. California* (1974) 39 Cal.App. 3d 844, 114 Cal.Rptr. 518 *and Stanley v. City and County of San Francisco* (1975) 48 Cal.App.3d 575 (1975) 48 Cal.App. 3d 575, 121 Cal.Rptr. 842 did not even involve discretionary immunity but the 6-month claim-filing requirement. And *Datil v. City of Los Angeles* (1968) 263 Cal. App. 2d 655, 69 Cal.Rptr. 788, and *Roberts, supra*, did not even involve equal protection but due process.

Martinez v. California (1980) 444 U.S. 277, is inapposite to the facts of this case because, unlike the sex offender there, Hahn and Hokinson are agents of a subdivision of the State which could forseeably harm Petitioner with whom

they had an employment relationship. Most importantly, a different immunity was involved in that case, under *Government Code §845.8* for injuries resulting from the release of a parolee, which notably does not say "whether or not discretion be abused." And as fn. 4 makes clear, only the due process, not the equal protection question was decided by this Court.

To be noted, on the other hand, is this Court's *dictum* in that case, insinuating that a federal interest might override a state immunity to protect the individual citizen from wholly arbitrary or irrational state action. Such is the case before you, since to argue that an immunity contained in a state statute can be contrary to the tenets of the State and the Federal Constitutions is absurd and violates every principle of statutory construction. It also contradicts the fundamental guarantee in *Government Code §§ 12920-12921* that employment without discrimination is a civil right to be afforded to *all* persons, that discriminatory employment practices deprive the *State* of the fullest utilization of its capacities and affect the interest of employees, employers, and the public in general, and that it is the purpose of *FEHA* to provide effective remedies which will eliminate such discriminatory practices. An interpretation which gives effect is preferred to one which makes void. *See Government Code §3541.*

B. The Strict Scrutiny, Not the Rational Basis, Test Applies

The wrongful death victims in the cases cited by Respondents did not have a constitutionally protected **right to a tort cause of action** against public officials. Accordingly, under the rational basis test the State was free to condition its waiver of sovereign immunity by precluding

liability for discretionary acts. Contrast that with Petitioner, who had a **constitutionally protected right to the job** that she lost, triggering a heightened level of review: the strict scrutiny test, under which **discretionary** immunity fails, particularly where other subsequently enacted statutes,[5] and particularly the Constitution, impose a **mandatory** duty not to do that which the immunity allows. *Cf. Bonds v. State of California (CHP)* (1982) 138 Cal.App.3d 314, 322 in which the duty to arrest a drunk driver was not mandatory but discretionary.

C. It Is Simply Not the Law in California that Employees May Not Sue their Supervisors

Reno v. Baird, (1998) 18 Cal.4th 640 only applies to ***discrimination*** claims, not to the myriad of other civil rights and constitutional claims raised by Petitioner, which Respondents would rather omit in their brief to this Court. *Cf., eg., Page v. Superior Court* (1995) 31 Cal.App.4th 1206, 37 Cal.Rptr.2d 529, holding an individual supervisor liable for ***retaliation*** and sexual ***harassment*** under *FEHA, and Shoemaker v. Meyers II* (1992) 2 Cal.App. 4th 1407, 1423-1425, 4 Cal.Rptr. 2d 203 *and Southern Cal. Rapid Transit Dist. v. Superior Court* (1994) 30 Cal. App. 4th 713, 36 Cal.Rptr. 2d 665, finding no discretionary immunity for violations of the whistleblower statutes on public policy grounds. And no case has ever held that absolute discretionary immunity under *Government Code § 820.2* can bar a cause of action under the California Constitution.

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[5] For example, the California Tort Claims Act was adopted in 1963; FEHA in 1980, the Labor Code whistleblower statute in 1984, and the Bane Act in 1987, which suggests that the Tort Claims Act could not have been not intended to bar these civil rights causes of action.

Retaliation will support punitive damages against individuals. Petitioner is not claiming and has never claimed punitive damages against the public entity; in fact her equal protection argument assumes the opposite. Accordingly, Respondent's argument at RB:15-16 is not only false and misleading, but nonsense, as well.

D. Contrary to Respondent's False Assertion, with respect to Constitutional and Civil Rights Violations Liability, not Immunity, is the Law in California

For a seminal statement of this rule, *see Muskopf v. Corning Hospital Dist.* (1961) 55 Cal.2d 211, 219, 11 Cal.Rptr. 89, 359 P.2d 457, the California Supreme Court decision that practically abolished sovereign immunity in California and triggered the California Tort Claims Act.

And cf. Scruggs v. Haynes (1967) 60 Cal. Rptr. 355 in which the California Court of Appeal refused to extend discretionary immunity to civil rights violations at the hands of police. Why should victims of civil rights violations at the hands of public lawyers be entitled to any less protection? If nothing else, preserving the dignity and integrity of the profession requires that, at a minimum, if be accorded the same protection, if not more.

E. Federal law Recognizes and Respects Liability for Constitutional and Civil Rights Violations

At RB:11 Respondents refer to the similar discretionary immunity of the Federal Tort Claims Act, but omit to mention that 28 U.S.C. 2679(b)(2) thereof specifically allows suit against individual federal officials for constitutional and statutory violations, a notable difference in which California

falls short of federal law, affording the victims of civil rights violation less, not more, protection.

And why did Congress abrogate States' Eleventh Amendment immunity for violations of the Americans with Disabilities Act, the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, title VI of the Civil Rights Act of 1964, and the provisions of any other federal statute prohibiting discrimination by recipients of federal financial assistance? See 42 U.S.C. §2000-7 and §12202. And why do federal courts recognize only qualified, not absolute, official immunity for civil rights and violations by public officials?

CONCLUSION

Before you is not just a litigant but a lawyer who always tried to do the right thing for her public client, even at the cost of losing her job and suffering the dire financial and emotional consequences of now almost two years of cut-throat litigation, to the detriment of not just her career but, more importantly, her health and her young family.

Please do not let this happen to someone else. Grant review and also uphold the principle that public officials, particularly when they are lawyers, cannot be above the Constitution and civil rights statutes that they swore to uphold and respect.

Respectfully submitted, this 1st day of February of 1999.

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APPENDIX

APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RICHARD HIGUERA, CARL McCALLA, and other former and present employees similarly situated, Plaintiffs/Appellees,	)
CITY OF LOS ANGELES, and DEPARTMENT OF WATER AND POWER OF THE CITY OF LOS ANGELES Defendants/Appellants.	)

U.S. Court of Appeals
Docket Nos. 96-55325
96-55418
96-55419
96-55840
96-55841
96-55844
District Court Docket No. DC# CV-93-2527 JGD (Tx)
Central District of California (Los Angeles)

MOTION OF THE DEPARTMENT OF WATER AND POWER

FOR AN ORDER VACATING THE UNILATERAL EXTENSION OF THE BRIEFING SCHEDULE GRANTED BY THE CIRCUIT MEDIATOR PER ORDER FILED 10-3-96 CONTRARY TO CIRCUIT RULE 31-2.2

AND FOR AN ORDER REQUIRING APPELLEES TO FILE A TIMELY RESPONSE TO DWP'S OPENING BRIEF TIMELY FILED ON 10-1-96

EXPEDITED DECISION BY DUTY -JUDGE REQUESTED

Appellant/Cross-Appellee **DEPARTMENT OF WATER AND POWER OF THE CITY OF LOS ANGELES** ("DWP") hereby moves this Court for an expedited order from the duty-Judge (see reason underlined below) vacating the unilateral extension of the briefing schedule granted by the Circuit Mediator per Order filed 10-3-96, contrary to Ninth Circuit Rule 31-2.2, and for an order requiring Appellees to file a timely response to DWP's opening Brief timely filed with this Court as due on October 1, 1996, pursuant to the briefing schedule last agreed to by all parties per order filed August 12, 1996. See attached Explanatory Appendix of the briefing schedule history in this case.

Said motion is made on the grounds that the Circuit Rules of this Court have been, and continue to be, violated to the irreparable and innocent detriment of Appellant/Cross-Appellee, **DEPARTMENT OF WATER AND POWER OF THE CITY OF LOS ANGELES,** despite a 46-minute telephone conference held on October 23, 1996 with Circuit Mediator Dana L. Peterson at the request of Appellee's counsel that was not successful in resolving the dispute.

Because of the seriousness and-complexity of the violation, and the magnitude of the public interest at stake, it is therefore requested that this motion be referred to the duty judge and not to a clerk or other official in either the Mediator's Office or the Procedural Motions Unit, even though the motion is procedural in nature.

Decision of this motion is also requested to be Order, Appellant CITY OF LOS ANGELES ("City")'s Opening expedited because, under the Mediator's October 3, 1996 Brief is due November 1, and under the Mediator's last lawful order filed August 12, 1996, Appellees' Responsive and Opening Brief on Cross-Appeal is-due November 10, 1996, and apparently neither counsel has any intention of filing any briefs before a decision is rendered in Auer v. Robbins, 65 F.3d 702 (8th Cir. 1995), cert. granted (U.S. No. 95-897, June 24, 1996), a case currently pending before the U.S. Supreme Court.

NATURE OF THE CASE

This is one of two cases currently pending before this Court against DWP and the City involving the regulatory and constitutional validity of Department of Labor regulations interpreting the "white-collar" exemption of the Fair Labor Standards Act ("FLSA"), specifically the disciplinary component of 29 C.F.R. 9541.118(a)(5). That regulation purports to impose liability for overtime compensation at time-and-a-half for all otherwise-exempt employees, on employers whose disciplinary policies subject employees to partial-week disciplinary suspensions for reasons other than major safety violations.

The total liability exposure is calculated at $10 million for DWP alone, due to the doubling nature of liquidated damages, substantial interest and attorneys, fees claims, and the existence of a third case against DWP still pending in the District Court, which has the lion's share on

damages.

The City additionally has two other cases pending before the Ninth Circuit, to which DWP is not a party, which it has requested to trail behind the lead case, Block vs. Dent. of Water and Power, discussed below. See attached Statement of Related Cases.

ARGUMENT

The October 3, 1996 Order continuing the briefing schedule is contrary to Ninth Circuit Rule 31.2-2 for the following reasons:

1. Counsel for DWP was not notified of the proposed extension, and never agreed to it. The Circuit Mediator admitted in the October 23rd telephone conference that she "assumed," that counsel for the City, Assistant City Attorney Robert Cramer, would notify counsel for DWP and obtain consent, but in fact he did not. . And, in fact, at great personal sacrifice, since she was also filing an amicus brief in Auer vs. Robbins before the United States Supreme Court that was due on October 11, counsel for DWP timely filed DWP's Opening Brief on October 1, as due, believing this Court's August 12, 1996 Order to be in place, which it was, since the order granting the current extension was not filed until two days after Appellants' Opening Brief was due, on October 3, 1996.

2. Good cause is required by Circuit Rule 31-2.2(a), yet none was shown. The reason given during the telephone conference for the extension requested by Mr. Cramer was that Block v. Los Angeles Dept. of Water and Power, U.S.C.A. Case No. 94-56135, consolidated with 94-56421 and 95-553451 argued and submitted to this Court on March 6, 1996, had not yet been decided, and was then stayed pending Auer, per order vacating submission filed October 2, 1996. The order granting unilateral extension of the briefing schedule in a by the Circuit Mediator was filed October 3, 1996, although Mr. Cramer had apparently requested it in early September.

According to Rutter Group Practice Guide, Federal-Ninth Circuit Civil Apellate Practice, by Senior Circuit Judge Dorothy W. Nelson, page 6-19, paragraph 6:138.1, "the court seldom grants motions to stay an appeal pending disposition of another appeal unless the motion (1) is unnopposed, and (ii) states that resolution of the pending appeal will be dispositive of the appeal the moving party wants stayed."

DWP vigorously opposes any continuances of the briefing schedule because, for reasons elaborated upon below, not only is there no good cause for them, there is also tremendous prejudice to Appellants, position should they be granted, particularly DWP'S, who now has a brief on file that Appellees will have extra time tc reply to in light of numerous arguments and counterarguments briefed by the parties and multiple amici for both sides in Auer v. Robbins, previously not available, an undue advantage. And none of the proponents for continuance can unequivocally assure this Court that Aur will be dispositive, because not even the Supreme Court of the United States knows that at this time, nor for some time to come.

Additionally there are questions of liquidated damages, attorneys, fees, and extent of damages peculiar to this case because of a Mayoral Directive challenged by Appellees on cross-appeal, that will definitely not be resolved by the Supreme Court's decision in Auer because they are simply not in issue there, nor in Block, which was briefed very differently.

3. Because the extension requested by Mr. Cramer unbeknownst to counsel for DWP but with the apparent knowledge and consent of Appellees' counsel, Stuart Libicki, was for more than fourteen days, it could only be granted under Ninth Circuit Rule 31-2.2 upon written motion supported by a showing of diligence and substantial need filed at least seven days before the due date, and accompanied by a declaration stating (1) when the brief was due; (2) when the brief was first due; (3) the length of the requested extension;

(4) the reason an extension is necessary; (5) movant's representation that movant has excercised diligence and that the brief will be filed within the time requested; and
(6) whether any other party separately represented objects to the request, or why the moving party has been unable to determine any such party's position. No such written motion was ever filed or showing made, and counsel of record for DWP was never otherwise notified of the proposed extension except by receipt of the Circuit Mediator's order on October 10, 1996.

4. Since a previous extension of the original briefing schedule had been granted with the consent of counsel for all parties per Order of this, Court filed August 12, 1996, the October 3, 1996, verbal, unilateral extension of the briefing schedule was barred under Circuit Rule 31-2.2 in the absence of "a motion, which must be in writing, demonstrating extraordinary and compelling circumstances," which are simply not present here.

THERE IS NO GOOD CAUSE FOR THE CONTINUANCE AND TREMENDOUS PREJUDICE TO APPELLANTS IF IT IS RANTED

Continuance of the briefing schedule is nothing more than a last-minute attempt by Appellees to cut their costs in the face of now imminent defeat- that is a risk inherent in the litigation process, particularly on appeal. But this appellant has been diligent in the prosecution of this appeal and, short of capitulation by Appellees, DWP should not be deprived of the opportunity to prevail on the arguments it has made to this Court, and possibly establish precedent helpful to itself and the public sector at large, perhaps even before Auer is decided, should this Court so choose on the basis of the briefing which so urgently needs to be completed in this case, and quite possibly used as authority by the Supreme Court in Auer.

As this Court is aware, Stanley v. City of Tracy-,

Auer and would have languished in the Ninth Circuit unnecessarily for however many months or years it takes the Supreme Court to decide Auer. This delay is particularly costly to Appellants because of post-judgment interest being sought by Appellees in this case where, for example, actual plus liquidated damages exceed half a million dollars as to DWP alone.

In any event, the import of Auer, if any, can of course be raised at oral argument of this case, or by supplemental briefs, should that even be necessary.

Continuance of the briefing schedule in Higuera is also prejudicial to the administration of justice in that DWP has a motion pending before the merits panel asking that the same panel that heard oral arguments in Block decide this case. Appellees are not opposing that motion, and every indication from the Clerk's Office is that this Court would probably grant such a motion, particularly if unopposed, because of the need to conserve scarce judicial resources and achieve consistent results in different cases pending against identical defendants. But if a stay is granted in Higuera, a decision in Block will be unnecessarily delayed for however many more months it takes the parties to complete briefing in Higuera, so that both cases can be decided together.

It would make a lot more sense for briefing in Higuera to be completed as soon as possible, particularly now that it has commenced to the innocent detriment of DWP, and if the Ninth Circuit then chooses to wait for a decision in Auer, as it has on other FLSA cases, it has two fully-briefed cases, Block which has been argued and submitted, and Higuera, which will then be ready to be argued, in light of Auer if necessary.

So while Appellees are apparently choosing, for tactical reasons, not to oppose DWP's motion to have both Higuera and Block heard by the same panel, they are, in effect, undermining the lawful purpose of that motion by their legal maneuvering for a continuance at this precise moment in the

briefing schedule.

Since the City should not suffer a dismissal of its appeal as a result of the misconduct of its own counsel, Mr. Cramer, and Appellees only get and want to write one responsive/opening brief against both Appellants, and obviously they cannot reply to a brief from the City that has not yet been filed, counsel for DWP proposed, during the October 23rd telephone conference with the Circuit Mediator, to agree to the briefing schedule set forth in the October 3, 1996 order that is being challenged here, but categorically opposes any further continuances of the briefing schedule beyond that contrary to this Court's rules. This, however, was not acceptable to other counsel, who instead requested further continuances, and have apparently no intention of filing any briefs with this Court until Auer is decided. Hence the need for the instant motion to let the Court decide.

C0NCLUSI0N

The sad and unfortunate sequence of events giving rise to this motion is precisely the reason for rules such as Ninth Circuit Rule 31-2.2 and the ethical prohibition against ex-parte communications with the courts. As an officer of this Court and a member of the Bar, it is my sworn duty to both my client and the profession to ask this Court to uphold them.

DATED: October 24, 1996 Respectfully submitted,

JAMES K. HAHN, City Attorney
THOMAS C. HOKINSON, Chief Assistant for City Attorney for Water and Power

By /S/
OLGA H. GARAU
Deputy City Attorney

HIGUERA V. CITY AND DWP - EXPLANATORY APPENDIX

Two groups of appeals in this case:

Group A Appeals on Liability and' Damages		Group B Appeals of Attorneys' Fees and Costs of Suit	
96-55325	by City	96-55840	by OWP
96-55418	by DWP	96-55841	by Plaintiffs
96-55419	by Plaintiffs	96-55844	by City

History of Briefing Schedule on Cross-Appeal;

Per Circuit Mediator Order Filed 5-29-96:			Per Clerk's Order Filed June 19, 1996:		
City/DWP's	due	10-1-96	City/DWPIS	due	9-23-96
Appellees'	due	11-10-96	Appellees'	due	10-31-96
City/DWP's	due	12-20-96	City/DWP's	due	12-2-96
Appellees'	due	1-3-97			

Per Circuit Mediator's Order Filed 8-12-96:
(DWP and City permitted to file separate briefs and all six appeals ordered calendared together)

City/DWP's	due	10-1 -96
Appellees'	due	11-10-96
City/DWP's	due	12-20-96
Appellees,	due	1-3-97

Per Circuit Mediator's Order Filed 8-12-96:
(same schedule for both groups of appeals)

City/DWP's	due	10-1 -96
Appellees'	due	11-10-96
City/DWP's	due	12-20-96
Appellees,	due	1-3-97

STATEMENT RELATED CASES

Block v. Los Angeles Dept.of Water, U.S.C.A. Case No. 94-56135, consolidated with 94-56421 and 95-55345, argued and submitted on March 6, 1996. Per Order filed on 10-2-96, submission vacated pending disposition of Auer v.Robbins, 65 F.3d 702 (8th Cir. 1995), cert. Granted (U.S. No. 95-897, June 24, 1996). Counsel of record is identical to that in Higuera.

Harding v. City of Los Angeles, U.S.C.A. Case No. 96-55286 (Per Order filed August 2, 1996, Appellant's Opening Brief is due November 10,1996, Appellees' Responsive Brief is due November 20, 1996, and Reply Brief due January 3, 1996). Appellant CITY is represented by Robert Cramer; Appellees are represented by Stuart Libicki. DWP is not a party.

Morsch v. City of Los Angeles, U.S.C.A. Case No. 94-56701 consolidated with 94-56729. Per order filed 1-29-96, briefing schedule vacated pending conference with Circuit Mediator Dana L. Peterson; per Circuit Mediator Order filed March 20, 1996, appeal stayed pending a decision in Block. Appellant CITY is represented by Robert Cramer- Appellees are represented by Duane Reno. DWP is not a party.

McGuire v. City of Portland, Oregon, U.S.C.A. Case No. 95-35391, 91 F-3d 1293 (9th Cir. August 2, 1996). Per Order filed August 30, 1996, amicus brief received and decision on petition for reconsideration and suggestion for rehearing en banc deferred, pending Supreme Court's decision in Auer.

Stanley v. City of Tracy, U.S.C.A. Case No. 95-16242. Case argued and submitted as scheduled on October 10, 1996, and then stayed, pending decision in Auer.

MEMORANDUM

TO: THOMAS C. HOKINSON, Senior Assistant Cl-ty Attorney Chief AssistanV City Attorney for Water and Power

FROM: OLGA H. GARAU, Deputy City Attorney

RE: Higuera v. City of Los Angeles Department of Water and Power, Ninth Circuit Case Nos. 9655325, 96-55418, 96-55419, 96-55840, 96-55841, and 96-55844

DATE: November 4, 1996

As I tried to explain to you on October 30, 1996 when you summoned me to your office that morning, and at another meeting called at 4:00 P.M. that afternoon by City Attorney James K. Hahn and attended by you, me, Civil Division Chief, Assistant City Attorney Tom Bonaventura, Employee Relations Supervising Attorney, Senior Assistant City Attorney Fred Merkin, and Assistant City Attorney Robert Cramer, and again this morning when summoned for the third time to discuss this matter with you in the presence of my Supervising Attorney, Assistant City Attorney Terso Rosales, who has just returned from protracted sick leave, several rules of ethics ethically preclude me from withdrawing the motion regarding the briefing schedule in this case for various reasons that include the fact that to do so would not be in the best interests of our client.

The motion in question speaks for itself as to why the unilateral extension sought by Cramer and opposing counsel

Stuart Libicki was totally improper and prejudicial to the client. The motion also contains legal authority refuting the incorrect legal and tactical position that all of you have taken that a stay will necessarily be granted. Moreover, withdrawal of the motion deprives the client of the possibility of having our opponent's cross-appeal subsequently stricken and of having our opponents precluded from presenting oral argument in reply to our appeal as provided by Ninth Circuit Rules for failure to file a timely brief.

The only reason that has been given to me so far for withdrawing the motion is that the City Attorney has been "embarrased" by this motion and cannot afford to have two deputies taking inconsistent positions in court, The inconsistency of course only arises because Cramer failed to file a timely brief and now wants to join, on behalf of the City, in the opposition's proposed motion to stay the appeal to cover up his mistake.

With regards to your accusation of failure to consult my supervisor in the "chain of command" before filing the motion, you admitted at the meeting with Rosales this morning that other than "common sense," there are no written or other procedures applicable to this situation and, as has always been my understanding in seven years, working in this Legal Division, that attorneys in this Office are not required to consult with their supervisors before filing pleadings, motions, and other documents in court.

I requested of you at the October 30th morning meeting in your office that the client be notified of what was happening, and I specifically requested that Department of Water and Power's Assistant General Manager and Chief Administrative Officer Faye Washington, with whom I had previously discussed this matter, be notified and attend the

meeting on October 30th in Bonaventura's office, but you flatly refused, stating that this matter was to be resolved internally within the City Attorney's Office. At the meeting this morning I again requested that the client be notified, and you again refused on the same grounds.

I expressed at the meeting on October 30th in Bonaventura's office, and again at the meeting in your office this morning with Rosales, that I have not only a legal right to complain about misconduct by another public employee, but also, in this instance,, a legal duty, because it prejudices, in my professional opinion, the interests of my public client.

The Rules of Professional Conduct applicable to all California lawyers require that the client be notified of what is happening. The conduct that you are directing me to engage in constitutes illegal deceit, collusion, and willful delay of the client's suit, punishable as a misdemeanor under the Business and Professions Code. I cannot and will not in good conscience engage in such conduct.

cc: James K. Hahn, City Attorney
Tom Bonaventura, Civil Branch Chief
Terso R. Rosales, DWP Employee Relations Supervisor
William R. McCarley, DWP General Manager
M. Faye Washington, DWP Assistant General Manager/CAO
Dennis A. Tito, President, Water and Power Commission
Jose de Jesus Legapi, Vice-President, Water and Power Comm.
Carolyn L. Green, Member, Water and Power Commission
Judy M. Miller, Member, Water and Power Commission
Marcia F. Volpert, Member, Water and Power Commission